(22,018)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 792.

B. ALTMAN & CO., PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 14, 1910.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the Circuit Court of the United States for the Southern District of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between B. Altman & Co., Appellants, vs. The United States, Defendants, a manifest error hath happened, to the great damage of the said B. Altman & Co. as is said and appears by their complaint; We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, Do Command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the Supreme Court of the United States, at the Capitol in the City of Washington, together with this writ, so that you have the same at the said place, before the Justices aforesaid, on the second Monday of October next, that the record and proceedings aforesaid being inspected, the said Justices of the Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 2nd day of July in the year of our Lord one thousand nine hundred and nine and of the Independence of the United States the one hundred and thirty four-.

[L. S.]

—— ——.

Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

E. HENRY LACOMBE, *U. S. C. J.*

2 [Endorsed:] E. & A. C. 2945. 2. Supreme Court of the United States. B. Altman & Co., Plaintiff in Error, vs. The United States, Defendant in Error. Writ of Error. Attorney-for Plaintiff in Error, Curie, Smith & Maxwell, 32 Broadway, New York City. Due service of a copy of the within Writ of Error is hereby admitted this — day of ——, 188. —— ——, Attorney for Defendant in Error. A copy of the within paper has been this day received at this office, Jul- 7, 1909. Henry A. Wise, U. S. Attorney. M. U. S. Circuit Court, Southern District, N. Y. Filed Jul- 7, 1909. John A. Shields, Clerk.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, by virtue of the foregoing Writ of Error, and in obedience thereto, do hereby certify, that the following pages, numbered from three to 109 inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the cause of B. Altman & Company, Plaintiff in error, against The United States, Defendant in Error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 10th day of November in the year of our Lord, one thousand nine hundred and nine and of the Independence of the United States the one hundred and thirty-fourth.

[Seal of U. S. Circuit Court, South. Dist. New York.]

JOHN A. SHIELDS, *Clerk.*

3 *Summons to Return Record.*

At a Stated Term of the United States Circuit Court for the Southern District of New York, held at the United States Court and Post-Office Building in the City of New York, on the 29th day of October, 1908.

Present: Hon. E. Henry Lacombe, Circuit Judge.

In the Matter of the Application of B. ALTMAN & Co. for a Review of the Decision of the Board of U. S. General Appraisers as to the Rates, &c., of Duties on Certain Merchandise Imported by Them per S. S. La Provence, Sept. 1, 1906. Entry No. 214,080.

Upon reading and filing the annexed petition of B. Altman & Co., importers of the merchandise therein described, and on motion of Curie, Smith & Maxwell, attorneys for said petitioners,

It is ordered, That the Board of U. S. General Appraisers at the port of New York return to this Court the record and the evidence taken by them in each of the above-entitled matters, together with a certified statement of the facts involved in the case and their decision thereon.

E. H. LACOMBE,
U. S. Circuit Judge.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Oct. 29, 1908. John A. Shields, Clerk.

4 *Petition.*

United States Circuit Court for the Southern District of New York.

In the Matter of the Application of B. ALTMAN & Co. for a Review of the Decision of the Board of U. S. General Appraisers as to the Rates and Amount of Duties on Certain Merchandise Imported by Them—

Per S. S.	Date of entry.	Entry No.	Board No.	Collector's No.
La Provence	Sept. 1/06	214,080	267,838	2600

To the Honorable, the Circuit Court of the United States for the Southern District of New York:

Your petitioner B. Altman & Company, being dissatisfied with a decision made on or about the 29th day of September, 1908, by the Board of U. S. General Appraisers designated by the Secretary of the Treasury, for and on duty at the port of New York, reviewing and affirming the decision of the Collector of the port of New York as to the rate and amount of duty chargeable on certain merchandise imported at said port by your petitioner as above specified, respectfully make- application to the Court and set- forth herein the errors of law and fact complained of, to wit:

The said merchandise consists of a consignment, among other goods, of Bronze statuary. The same was classified and assessed by said Collector for duty at the rate of 45% ad val., under Par. 193, Sch. C. Act of July 24, 1897. Your petitioner- being dissatisfied with the said decision, gave notice to said Collector accordingly, within ten days after the ascertainment and liquidation of the duties, as aforesaid, setting forth the reasons for their objection thereto, claiming the said merchandise to be dutiable at 15% ad valorem under Sec. 3, of the Tariff Act of July 24, 1897 and the Reciprocity Treaty between the United States and France, T. D. (19405), or at 20% ad val. under par. 454, Sch. N, Act of July 24, 1897.

Thereafter the said Board of U. S. General Appraisers, proceeding to hear and determine the questions of law and fact involved in said matters, affirmed the decision of the said Collector in the premises.

And for the errors of law and fact in the decision of the said Board of U. S. General Appraisers herein complained of, your petitioner say-

5 The board of appraisers erred as matter of fact:

1. In not finding that the article in question was an article wrought from metal, the production of a professional statuary or sculptor.

The board of appraisers erred as matter of law:

1. In holding that statuary which is substantially made by casting is not wrought by hand from metal though it may be afterwards surface finished by the artist.

2. In not holding that after the various parts had been cast, the important work, that which gives it the distinctive personal char-

acter was done by hand, the sculptor going over the figure and making the alterations and finishing touches necessary to embody his idea.

3. In holding that it was intended to prohibit the importation under paragraph 454 of pieces of casting.

4. In holding that it was the purpose of paragraph 454 to protect Bronze foundries and domestic industries where great quantities of labor are employed and large capital is invested.

5. In not holding that the term "Statuary" as used in Section 3 and the French Reciprocity Agreement and the President's proclamation thereof is not subject to the definition found in paragraph 454.

6. In holding that the term "Statuary" as used in Section 3 and the French Reciprocity Agreement and the President's Proclamation thereof is subject to the definition found in paragraph 454.

7. In not holding the merchandise dutiable under Section 3 and the French Reciprocity Agreement, at 15% ad valorem.

8. In not holding the merchandise dutiable at 20% under paragraph 454.

9. In holding the merchandise dutiable at 45% under paragraph 193.

10. In sustaining the action of the Collector and overruling the protest of the Importer.

11. In not sustaining the protest of the Importer and overruling the action of the Collector.

Accordingly, your petitioner- respectfully pray the Court to order the said Board of U. S. General Appraisers to return to the Court the record and evidence taken by the said Board, together with a certified statement of the facts involved in the above cases, and of its decision thereon; and thereupon, and upon such further evidence as may be hereafter taken pursuant to the statute in such cases made and provided, to proceed to review said decision, and to determine the questions of law and fact involved in the same.

Dated, New York, Oct. 29th, 1908.

B. ALTMAN & CO., *Petitioners,*
By CURIE, SMITH & MAXWELL,
Attorneys, 32 *Broadway, New York City.*

(Endorsed:) U. S. Circuit Court, Southern District N. Y., Filed Oct. 29, 1908, John A. Shields, Clerk.

6 *Bond for Costs.*

Know all Men by these Presents, That I H. B. J. Craig, am held and firmly bound unto the United States of America in the sum of Fifty Dollars to be paid to the said United States of America.

For the payment of which well and truly to be made, I bind myself, my heirs, executors and administrators, jointly and severally firmly by these presents. Sealed with my seal, and dated the 28th day of October in the year of our Lord one thousand nine hundred and eight.

Whereas, B. Altman & Co., have applied to the Circuit Court of the United States for the Southern District of New York for a review of the questions of law and fact involved in certain decisions of the Board of United States General Appraisers made upon the entry of certain merchandise imported by them per s. s. La Provence, Sep. 1, 1906, Entry No. 214,080.

Now, therefore, the condition of this obligation is such, that if the above named H. B. J. Craig, shall prosecute said proceedings with effect and pay all damages and costs which shall be awarded against them therein, of if they shall fail to make said proceeding good, then this obligation shall be void, otherwise the same shall be and remain in full force and effect.

H. B. J. CRAIG. [SEAL.]

Sealed and delivered and taken and acknowledged, this 28th day of October 1908 before me.

[SEAL.] ELY NEUMANN,
Notary Public, New York County.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

H. B. J. Craig, be- duly sworn, deposes and says that he does business in the Southern District of New York, in the City of New York; that he is worth the sum of One Hundred Dollars over and above all his just debts and liabilities.

H. B. J. CRAIG.

Sworn to this 28th day of Oct., 1908, before me,

[SEAL.] ELY NEUMANN,
Notary Public, New York County.

This Bond is approved as to form and amount and sufficiency of surety.

Dated, New York, October —, 1908.

E. HENRY LACOMBE,
U. S. Circuit Judge.

(Endorsed:) U. S. Circuit Court, Southern District N. Y., Filed Oct. 29, 1908, John A. Shields, Clerk.

7 *Return of the Board of United States General Appraisers to the Order of the Court.*

UNITED STATES CIRCUIT COURT,
Southern District of New York:

Suit. 5372.

B. ALTMAN & CO.
vs.
UNITED STATES.

On Application for Review of a Decision of the Board of United States General Appraisers.

NEW YORK, *November* 25, 1908.

In response to the order of the court said Board hereby returns as given below, the records in the above-entitled matter, and certifies that a complete statement of the facts involved in the case, together with the decision of the Board, is embraced therein, and that no other facts were ascertained by said Board than such as are thus shown.

Specifically, the return comprises:

1. The importers' protest 267,838, with copies of the reports of the Collector of Customs and the United States Appraiser thereon.
2. A transcript of the testimony taken before the Board.
3. The exhibits mentioned in said testimony, which are forwarded under separate cover.
4. A copy of the decision of the Board (G. A. 6813; T. D. 29,279).

BYRON S. WAITE,
H. M. SOMERVILLE,
EUGENE G. HEY,
Board of U. S. General Appraisers.

8 Protest 267,838.

NEW YORK, *Jan.* 25, 1907.

Collector of Customs, New York.

SIR: We hereby protest against your decision, liquidation and assessment of duties as made by you on our importations below mentioned, consisting of certain statuary, contained in the cases or packages marked and numbered as described on the entries and invoices thereof, to which for more certainty of description, reference is hereby had, claiming that by virtue of the provision for statuary in Section 3 of the Tariff Act of July 24, 1897, and the reciprocity treaty entered into between the United States and France (See T. D. 19,405), said statuary is dutiable at only 15% ad valorem.

We further claim that all statuary covered by the entries below mentioned is properly dutiable at 15% ad valorem by virtue of the provision for statuary in Section 3, and the reciprocity treaty entered

into between the United States and the country from whence said statuary was imported.

For treaty with Italy, see T. D. 22,373; Germany, T. D. 22,353; France, T. D. 19,405.

Vessel.	From	Date of entry.	Entry No.	If warehouse, W. H. bond.	Date of liq'd'n.	Marks and numbers of packages.
La Provence	Havre	Sep. 1/06	214,080	27,263	Jan. 17, 07	B A & C 776/78 and others as per entries and invoices.

B. ALTMAN & CO.,
CURIE, SMITH & MAXWELL,
Attorneys, 22 *William Street, N. Y.*

9 Copy.

UNITED STATES CUSTOMS SERVICE,
PORT OF NEW YORK,
COLLECTOR'S OFFICE, *Aug.* 2, 1907.

Board of U. S. General Appraisers at the Port of New York.

GENTLEMEN: I submit the protests of B. Altman & Co. Nos. 2444, 2600, 2945, against the assessment of duty as made by this office on certain so-called "statuary," imported by them in the vessels named. An inspection of the invoices shows that the merchandise in question was returned by the Appraiser as "manufactures of metal 45%." Duty was assessed thereon at 45% ad valorem under the provisions of Par. 193, act of July 24, 1897.

Reference is made to the three special reports of the U. S. Appraiser herewith, dated April 2, 1907.

I have to report that the claimants have complied with the requirements of section 14 of the act of July 10, 1890, so far as lodging protests within the statutory time.

The Naval Officer concurs in the decision of this office.

The entries and invoices covered by the above protests are inclosed herewith.

Respectfully,
(Signed) J. J. COUCH,
Special Deputy Collector.

13 inclosures.

10 (Copy.)

OFFICE OF THE APPRAISER OF MERCHANDISE,
PORT OF NEW YORK, N. Y., *April* 2, 1907.

Appraiser of Merchandise, District of New York.

SIR: Replying to protest No. 2600 of B. Altman & Co. against the assessment of duty at the rate of 45% on certain merchandise imported by them ex "La Provence," September 4, 1906, invoice No. 1846, entry No. 214,080, I have to report as follows:

The merchandise in question, marked "A" on the invoice, consists of cast bronze figures, some being trimmed with ivory, but of which bronze is the component material of chief value. They were returned for duty at 45% ad valorem under paragraph 193, following T. D. 24,016.

No sample retained.

Respectfully,

(Signed) M. NATHAN,

Assistant Appraiser, Second Division.

(Indorsement:) Respectfully forwarded to the Collector, approved. M. Nathan, Deputy Appraiser.

11 Statuary—Reciprocity.

The U. S. General Appraisers.

In the Matter of B. ALTMAN & Co.

Protest 267,838.

Before Board No. 3.

Present: Waite, General Appraiser.

NEW YORK, N. Y., *January* 31, 1908.

Appearances:

W. Wickham Smith, Esq., and J. K. Maxwell (Curie, Smith & Maxwell), Counsel for the Protestants.

T. M. Lane, Esq., Ass't Counsel for the Treasury Department.

Mr. SMITH: This hearing is in case 267,838 on an importation of B. Altman & Co. by the Steamer La Provence, dated September 4, 1906.

(Appraiser's report:) The merchandise in question marked "A" on the invoice, consists of cast bronze figures, some being trimmed with ivory, but of which bronze is the component material of chief value. They were returned for duty at 45% ad valorem under paragraph 193, following T. D. 24016.

The goods are claimed to be dutiable at 15% under Section 3 of the tariff act of 1897 and the reciprocity treaty between the United States and France, T. D. 19,405.

Miss MARY WHEATON, called as a witness on behalf of the Importers, having been duly sworn, testified as follows:

By Mr. SMITH:

Q. Miss Wheaton, are you connected with the firm of B. Altman & Company?

A. I am.

Q. In what capacity?

A. Buyer of their Art Department.

Q. How long have you filled that position?

A. 7 years; 7 or 8 years.

12 Q. How long have you been in any way connected with works of art?

A. I was with Stern Brothers.

Q. In the same capacity?

A. For 12 years and over; almost 15. I would not like to say how many.

Q. When you spoke of being buyer for the art department, that includes statuary does it?

A. Statuary of all kinds.

Q. Cast statuary?

A. Yes, marble.

Q. How long have you been familiar with cast bronze statuary?

A. Oh, 12, 15 years; 12 years and longer.

Q. I show you an invoice No. 1846 from Fenrick Freres & Co., of 15 Rue Fenelon, Paris. You know that house?

A. Yes, that is a commission house.

Q. Now, on this entry I call your attention on the second page of the invoice to an item of 1 bronze bust Louis XVI invoiced at 800 francs less 10 per cent.

A. Yes.

Q. Do you remember that article?

A. Perfectly.

Q. Did you order it?

A. I did.

Q. Now, you saw it after it was imported?

A. Yes, I did.

Q. Would you kindly describe it, in a general way, I mean.

A. Well, it was a bust measuring possibly 23 or 24 inches tall, had shoulders about 18 to 19 inches, quite broad; had a base at the bottom possibly about 10 to 10½ inches square, maybe 12. Hardly; 10 to 10½.

Q. Let me ask you whether it was such a bust as pertained to the rank of a work of art.

Mr. LANE: I object on the ground of lack of qualification.

By Mr. SMITH:

Q. Have you been buying statuary for a number of years?

A. I have.

Q. Of all grades?

A. Yes.

Q. From common and cheap varieties up to very fine works of art?

A. I have.

13 Q. How high in price have any statues that you have bought run?

A. Well, 5,000 francs; maybe seven.

Q. You have been to Italy have you?

A. Yes.

Q. And have you been in the studios?

A. Yes, all of them.
Q. Sculptor's or artist's who made bronze statuary?
A. Yes.
Q. Seen their work?
A. Yes.
Q. And their method of producing it?
A. Yes.
Q. State whether or not you have familiarized yourself in your position with the standing of the various artists producing bronze statuary.
A. Thoroughly.
Q. State whether or not in your position you have familiarized yourself with the artistic character of various articles of bronze statuary?
A. I have.
Q. State whether or not it is necessary for you to have such knowledge and familiarity as you have testified to in order to properly conduct your business as a buyer for the persons by whom you are employed?
A. Most essential.
Q. Now I repeat the question put to you before, whether the particular bust of Louis XVI referred to in this invoice was such a production as constituted a work of art?
A. It certainly was.
Q. Do you know how bronze statuary like this bust is produced?
A. Yes.
Q. By personal observation?
A. Yes.
Q. Without asking you to describe the process in detail I will ask you to state to what extent the artist has to do with the production of such an article as the bust described in this invoice.

Mr. LANE: It ought to be shown that the witness has seen this entire process.
Objection overruled.

14 A. He has to see that the expression is what was in his original model and if it is not as it should be he has to chase the figure to make it, to give the expression that he intended in the original plaster cast.

By Mr. LANE:

Q. You mean that he does that individually?
A. By hand.

By Mr. SMITH:

Q. State whether or not the finishing of an article of this character is done under the personal supervision of the artist who originally conceived the design?
A. The finish of the expression, the finish of the coloring is what anyone wants.
Q. Now this particular bust was cast, wasn't it?
A. Cast, yes.

Q. Cast bronze statuary?

A. Cast bronze statuary.

Q. Let me ask you whether in all your experience in dealing with bronze statuary you have ever come in contact with or known of any artistic bronze statuary that was produced in any other manner than by casting?

A. Not to my knowledge.

Q. You never saw anything?

A. I never saw a piece.

Q. Nor heard of it?

A. No, sir.

Q. And in your business as a buyer for the houses you have mentioned, you never either saw or heard of any bronze statuary other than cast bronze statuary?

A. I would not know of anything any different.

By Mr. LANE:

Q. Miss Wheaton, have you ever studied art?

A. Yes, in so far as making a study of what I think shall be artistic and the ideas of what in bronze and marble and in those things, only for my own help as a buyer.

Q. But that has been in the course of your commercial experience I take it?

15 A. Yes.

Q. You have never studied art theoretically, have you?

A. No.

Q. Has your judgment ever been asked by art institutions as to the character of any particular work?

A. No.

Q. When you say you have a familiarity with art, then you mean that you have the familiarity requisite to enable you to choose what you think are works of art in a commercial way?

A. Well, more to know how the article has been produced so that I shall be enabled to give information to the clerk in selling it, knowing how it is made and how it is produced, etc.

Q. You have said that bronze statuary similar to this bust of Louis XVI is more or less manipulated by the sculptor after the casting is done?

A. Yes, at the foundry after the casting is done at the finish.

Q. To just what extent have you observed that done?

A. Well, I have seen the plaster model and I have seen the sand form and I have seen the—not the plaster, but a kind of material which they use to put over this plaster model, and I have seen them pour the bronze into the model to form the figure and I have seen them work on the figure after it has been finished, cutting off the rough places at the bottom.

Q. How often have you seen that done?

A. Oh, many times.

Q. Is it not true that when the figure comes out of the mold it is approximately in the shape that it is when you sell it?

A. Oh, no; a great deal must be done before it is ready to be sold.

Q. Well, that consists largely in cutting off protuberances, that are left by pouring in the metal, doesn't it?

A. No, it means in lining the forehead where the wrinkles might be, as in the bust of Lincoln and unless those marks are chisled out they certainly would not give the expression of the face that the artist had intended.

16 Q. Just what is the chasing of the bronze? Will you describe that?

A. Well, I have seen them with a small tool like a chisel chasing and picking it out, working it with their hand, chasing the metal away where it has been too heavy.

Q. Well, this work done by the artist is confined so far as you have observed to matters of detail, is it not, for example like the wrinkles in the forehead?

A. No, it is the entire thing, the shoulders may want to be shaped, they may be too full on one side; or the face must be chased also, and the expression, the arms, the hands, the fingers.

Q. Do you know as a matter of fact how this bronze bust of Louis XVI was made?

A. I only knew it must have been made like all the rest of them.

Q. Answer my question yes or no.

A. I did not see it made, not this bust made.

Q. You do not know how much work was done on this individual statue then?

A. I only know the same is done with all the statuary that is necessary; it was a usual piece of work.

Q. Now, you have stated that you have never seen any bronze produced otherwise than by casting?

A. Yes.

Q. Have you ever handled Japanese bronzes?

A. Yes, I have.

Q. Are you prepared to state that there is not work done in hammered bronze in Japan?

A. Oh, my yes, there are hammered bronze-, there are pieces done is hammered bronze, but that is not hammered.

Q. In Japan?

A. Yes.

Q. Some of the finest pieces of Japanese bronze are done by hand, hammering, aren't they?

A. A good many, but that would not be a figure; that would be more — a vase.

Q. Have you never seen hammered figures imported from Japan?

A. No.

17 Q. You are not prepared to say that such figures are not imported, are you?

A. I have never seen them only in vases; I do not see how they could be.

Q. Have you ever seen any bronze work done in medieval or ancient times that was hammered bronze work?

A. I know nothing about that.

Q. You have never studied the history of medieval or ancient work in bronze?

A. Not in a very thorough way. I have had my own ideas and have read, but not sufficiently for that.

Q. So that you are not prepared to state that such works are not extant, I take it?

A. I have never seen it. I have only seen hammered vases, never seen any hammered statuary.

HENRY W. S. PELL, called as a witness on behalf of the Importers, having been duly sworn, testified as follows:

By Mr. SMITH:

Q. Mr. Pell, with what firm are you connected?

A. Tiffany & Co.

Q. In Fifth Avenue?

A. Fifth Avenue and 32nd Street.

Q. In what department?

A. Art bronze and art goods.

Q. Are you at the head of the department?

A. Yes, sir.

Q. How long have you been so?

A. 20 years.

Q. Do you know any firm engaged in the business of dealing in jewelry, bronzes and clocks and articles of that character that does a larger business than that of Tiffany & Co.?

A. Not to my knowledge.

18 Q. What?

A. Not to my knowledge.

Q. Do you know of any house engaged in such a business in this country that ranks higher than the house of Tiffany & Co.?

A. I do not.

Q. How long has that particular house, if you know, been engaged in the business that it is now engaged in?

A. That I do not know. I think, well, I know Mr. Tiffany and Mr. Cook celebrated their 50th anniversary of their partnership or being together, rather, so it must have been over that.

Q. Does your firm deal largely in art bronzes?

A. Yes, sir.

Q. Very extensively?

A. Very largely, yes, sir.

Q. And in a very wide range of goods as to prices?

A. Yes, sir.

Q. Running as high as what?

A. Running up as high as 20,000 dollars.

Q. Now, when you say that you are the head of the department, will you tell me exactly what that means?

A. I manage the department and I am the buyer for the entire department.

Q. Both at home and abroad?

A. Both at home and abroad; yes, sir.

Q. You go abroad, do you?
A. Go abroad every year. Yes, sir.
Q. And have been doing that for years?
A. 19 years.
Q. And do you go to France and Italy and the other places where art bronzes are made?
A. Yes, sir; France, Germany, Austria and Italy.
Q. For a period of over 15 years you have been familiar with these articles, have you?
A. Yes.
Q. Have you seen them made?
19 A. Yes, sir.
Q. Have you been in the studios of the sculptors?
A. Yes, sir.
Q. More than one?
A. Yes, sir.
Q. And more than once?
A. Yes, sir.
Q. Are you thoroughly familiar with bronze statuary?

Mr. LANE: I object.
Mr. SMITH: I will withdraw it. That will save time.

By Mr. SMITH:

Q. Now Mr. Pell, is there a wide range in so-called bronze statuary?
A. A wide range in what way?
Q. In regard to artistic character and commercial value?
A. Yes.
Q. Do you have to do with bronze statuary which consists of figures?
A. Figures, yes, sir.
Q. Attaining to the rank of works of art?
A. Yes, sir.
Q. Let me ask you as to bronze figures ranking as works of art, what the sculptor has to do with the production of such articles?
A. The sculptor first models it in clay and after he gets the clay to suit him he casts it in plaster because it is harder and more durable and then he finishes the plaster by chasing it to get the same feeling that he has in the wax, or clay, rather. After that they put it into a sand mold and make a sand mold from that plaster cast and then cast it in bronze.
20 Q. Where is that done?
A. Where is that done?
Q. Yes.
A. That is done in the foundry.
Q. Now, after that has been done?
A. After that is taken out of the mold, the mold is destroyed in taking it out, and after that it has to be finished so as to get the same artistic feeling in the bronze as he originally had in his clay model and plaster model.
Q. And by whom, or under whose supervision, is that done?

A. Always of the artist; he either does it himself or it must be done under his supervision; he would not allow it otherwise.

Q. Now, in all the years that you have been dealing with and familiar with bronze statuary in connection with the business of Tiffany & Co., I will ask you if you have ever seen, handled, known commercially or had anything to do with any statuary in the shape of busts or figures attaining to the rank of works of art which were produced by any other method than by casting.

A. Never have.

Q. Do you know of any figures, works of art in bronze, produced by any other process than by casting?

A. No, sir.

By Mr. LANE:

Q. Mr. Pell, are there not some bronze statues produced that are not finished by the sculptor?

A. Not unless they are produced under his supervision. All sculptors are not chasers but he will insist upon having them work at them until they get his own feeling in, and very often he has to even then make a few strokes in order to get just that expression and feeling that he has in his original model in the wax.

21 Q. Bronze is a very hard material, isn't it?

A. Rather hard, yes, sir.

Q. Considerably harder than marble.

A. Well, hard marble, Carrerra marble and Serravezza marble are hard marbles.

Q. Well, wouldn't you say that bronze was harder than the average marble that the sculptor works on?

A. Well, it seems to me I would say so, yes.

Q. Now when you speak of the finishing done by the artist, didn't you mean that that is work of a very superficial character?

A. No, sir.

Q. And has to do largely with detail, small details?

A. No, sir. Of course some parts of it is merely mechanical, such as chasing, but to chase the features or around the features or some part of the features, just to get that same expression and the same feeling that he has in his model, it is rather professional, sir.

Q. But after all, there is no very material change in the surface, is there?

A. Well, the change in the surface, they do not intend to change the surface except in small places, to bring out the proper expression.

Q. He might alter an eye brow?

A. He might alter the mouth, he might alter the expression around the eye, the nose, something of that kind.

Q. But there is no attempt to go all over this bronze statue with a chisel or other tool and bring out the contour of the face or the mouth, is there?

A. Well, only to improve it; it must be improved sometimes.

Q. What tools do they use for that purpose?

A. Chasers' tools, hammer and a chasing tool.

Q. Well, is a chasing tool a kind of chisel or is it a file?

22 A. No, it is a chisel; that is, there are different tools. I do not know the names of the tools but sometimes they don't have to cut. They have a tool with which they smooth down a part. Other times they have to chisel down a part slightly in order to finish it.

Q. Now this chasing is only done, isn't it, on works of the very highest order?

A. No, it is done on all of them.

Q. Done on clock ornaments?

A. Yes, sir.

Q. Low grade clock ornaments?

A. Well, they may chase only the model on a low grade clock ornament and then just cut off the rough and polish them for low price clock ornament, not spend much time on them.

Q. This is frequently done you say by chasers with the artists standing by?

A. Under their supervision, yes, sir.

Q. Is he always present when this is done?

A. Well, generally present, yes; it never goes out of the factory until he has seen what finishing touches are put on.

Q. Frequently many copies of one statue are made from the same model, aren't they?

A. Yes, sir.

Q. And those are I suppose assembled in the bronze foundry and chased up after they are cast?

A. Yes.

Q. Do you know as a matter of fact whether the artist goes around and supervises the chasing on each model?

A. He very frequently, if he is a good artist, if he thinks enough of his reputation, he will do so.

Q. You do not know as a matter of fact whether that is always done?

23 A. Well, "always" covers a whole lot of things, you know; large ground; large field. A very cheap statue or piece of statuary, it would be a different thing, but where they are cast in real bronze I know he generally superintends it. If he goes into his dealer's room and finds them for example there that have not been properly chased, he will make the man chase them again under his supervision. He will say "you must not spoil my reputation selling bronzes like that."

Q. Are you prepared to state, Mr. Pell, that there are no works in hammered bronze extant?

A. Not to my knowledge.

Q. Have you ever studied the history of art?

A. No, sir.

Q. Are you familiar with the bronzes in museums in this country and abroad?

A. Well, I have visited all the museums and am somewhat familiar with a great many of them; yes.

Q. Haven't you seen hammered bronze figures imported from Japan?

A. Never did; no, sir.

By General Appraiser WAITE:

Q. What imparts the smooth glossy surface to a bronze on bronze statuary?

A. The glossy surface?

Q. Yes; that perfectly smooth contour of the cheek.

A. That is done after the chasing is all finished. Some produce it by making a patiene. Before the patiene is put on some people boil them in wax and then wipe it all off and then put the patiene on, which gives it that shiny finish which you have seen on some fine bronzes.

Q. Aside from that smoothness, is that attained by rubbing or polishing?

24 A. That is attained by the chasing.

Q. By the tool?

A. By the tool.

Q. By the chaser?

A. Yes, sir, the chaser or the blunt instrument, go around hammering it, and then of course finishing it.

Q. In the production of this you took us up to the casting, as it came from the sand model?

A. Yes.

Q. Then you say they break the mold getting it out?

A. Yes; they make a new mold for each piece.

Q. They make a new mold from the original model that they produced from the plaster?

A. Yes, sir, for each piece.

Q. They do not make this by the wax process? The lost wax process?

A. Sometimes.

Q. Do you handle those now?

A. Yes, sir.

Q. Are they in the market?

A. Yes, sir; that is cast.

Q. That is cast, I understand, but it is a different operation from the one you have described here?

A. Yes; the operation in regard to that, they make a model, they cast a model in wax from the plaster model. That model, they make a sand model from that wax model and that is in the mold. They take this mold and they bake it in an oven in order to get it hard; all sand molds are baked to make them hard before they pour the metal in.

Q. Isn't that made of plaster?

A. No, sir.

Q. Outside of the wax, after the wax is laid on, isn't the mold outside of that plaster?

25 A. No, I do not understand it so, but as all sand.

Q. What holds the sand together?

A. Well, it is strong enough to make the mold. Then in baking this the wax is absorbed or runs out; some of it is absorbed in the sand and some runs out.

Q. They simply substitute the bronze metal for the wax?

A. Then they pour their mold, but the wax is lost in the baking.

By Mr. LANE:

Q. In chasing bronze statuary a dull tool is used as a rule, isn't it?

A. Well, yes; except where they want to make something, change the expression in cutting something off, you know.

Q. Did you ever see them cut over a bronze statue and chip off any substantial size pieces of bronze?

A. No.

VICTOR E. SMITH, called as a witness on behalf of the Importers, having been duly sworn, testified as follows:

By Mr. W. W. SMITH:

Q. Mr. Smith, what is your occupation?

A. Overseer of the Gorham foundries.

Q. You mean of the foundries belonging to or controlled by the Gorham Manufacturing Co.?

A. I do.

Q. Where is that concern located?

A. Providence, Rhode Island.

Q. And its wareroom and salesroom in this city, is it?

A. Fifth Avenue and 36th Street.

Q. And they are large dealers in silverware, are they?

A. Very large.

Q. And in clocks and bronzes and other articles of that kind?

A. Yes, sir.

26 Q. Now referring to the clocks and bronzes, bronzes particularly, that they handle there, are they imported or made here?

A. Mostly made here.

Q. There are some imported?

A. Some imported.

Q. And those that are made here are made in Providence, are they?

A. Yes.

Q. How long have you been with them?

A. 18 years.

Q. All for the same concern?

A. All for the same concern.

Q. Does the Gorham Manufacturing Company make and deal in these articles on a large scale?

A. They do.

Q. And with a wide range of qualities and prices?

A. Yes, they do.

Q. Running up into pretty high priced goods?

A. Yes.

Q. As high for instance, as what retail price?

A. Fourteen or fifteen thousand dollars; I might change that and say twenty thousand dollars. I know of a piece just made.

Q. Now, does your concern here make and sell bronze figures of an artistic character, attaining to the rank of works of art?

A. They do.

Q. And have they been doing that for years?

A. They have.

Q. And is the mechanical work done under your supervision?

A. It is.

Q. By whom are the designs for these artistic figures and bronzes conceived or furnished?

27 A. By the sculptors and artists.

Q. And you have a number of those, do you?

A. You mean in our employ?

A. Not in your employ necessarily but whose works you make.

A. Oh, yes; yes.

Q. Now I will ask you to what extent the sculptor himself takes part in the production of bronze figures of an artistic character ranking as works of art.

A. Well, in the first place of course he makes the model. After that it is turned into the foundryman's hands, and the rough casting cast out of the mold, the finishing and chasing is done under his supervision until it is ready to put upon the market.

Q. And is that always so in the case of works of art?

A. Always to my knowledge.

Q. Will you please state whether in all your experience you have seen or known or had anything to do with any bronze statuary figures of an artistic character that were produced in any other manner than by casting?

A. I have not.

By Mr. LANE:

Q. Mr. Smith, will you tell us just what is meant by finishing?

A. Well, when the casting comes out of the mold it is in pretty rough shape as a rule, both as to the surface, the seams caused by the cores, gaps in, cracks that may be in the mold caused by drying, and that is finished by a skilled workman under the direction of the artist or sculptor; the seams are removed, the gaps are removed, sometimes the entire surface is gone over by the chaser.

Q. Chasing then is a part of the finishing process?

A. Well, not only finishing, but the form is sometimes greatly changed by a chaser.

28 Q. What tools does he work with?

A. Well, he has chisels, punches, riffle.

Q. A riffle is a file is it?

A. No, a riffle is not a file. It is a chaser's tool; it is more of a finishing tool that is used after the chisels and punches have been used to put the finishing touches on.

Q. Is it in the nature of a file?

A. It is in the nature of a file.

Q. Now, speaking generally without reference to exceptional

cases, Mr. Smith, is there any material change in the contour of the figure by this chasing and finishing process?

A. Well, yes, there is considerable, that is mostly in the face or hands and in a great many times in the drapery of the figure. Of course, in the ordinary parts of it, such as the base or plinth; things of that sort; they don't do much to those.

Q. Well, when you say that there is a substantial change, isn't that change confined largely to small details like wrinkles, small folds in the drapery?

A. Yes, in a way yes, but the faults would have to be rectified in the chasing. One mold would be as perfect as another.

Q. That is to say, if they had a protuberance caused by an imperfection in a mold, you would file that off?

A. Not file it off; it would generally be cut off with a chisel.

Q. But would the chaser go over the figure as a marble sculptor would over a statue and chip out pieces of bronze?

A. No, he would not go all over it and chip out pieces of bronze, but he would cover the entire surface nevertheless. It is very seldom that there is no part of the surface of a cast statue that has not been touched in some way by the finishing, either by chisel-
29 ing or hammering or polishing.

Q. How deep is this work on the average?

A. In what way do you mean by deep?

Q. How deep into the surface does the chaser dig?

A. He may go a sixteenth of an inch, or a half inch, or an inch.

Q. Are alterations that involve the removal of a half an inch in depth of metal frequent?

A. Not very.

Q. Aren't they due as a rule to imperfections in the molds?

A. Yes, to that depth they are.

Q. Isn't it true that any chasing in the nature of an artistic touching up is applied only to small details and removes an infinitesimal depth of metal?

A. No, I have seen them carried to quite an extent myself; not exceptionally, but very often.

Q. Well, often over a sixteenth of an inch?

A. Yes, very often over a sixteenth of an inch.

Q. Now, is this man who uses the chasing tool an artist?

A. Well, he is a skilled workman and some of them are better than others; some are artists.

Q. Speaking from your own experience and in your own factory, are they as a rule men of artistic education?

A. Well, I do not know exactly what way you want to apply that, "artistic education."

Q. Have they ever made statues themselves?

A. No, no.

Q. Have they ever done anything but chasing bronze work as a rule?

A. Oh, yes.

Q. Bronze or silver work?

A. Oh, yes.

Q. Well, what kind of work have they done?
30 A. Well, chased bronze figures, statues, bas reliefs, panels.
Q. Have they done any other work than that?
A. Any other work than that?
Q. Yes.
A. Not to my knowledge.
Q. When you said that you had frequently seen the chaser go in deeper than the sixteenth of an inch, would such operations refer to the correction of imperfections or artistic changes?
A. When a chaser would go to that depth it is generally done by the direction of the artist himself who wishes to make some change or improve his figure according to his own idea.
Q. Well, the artist then, as I understand it, only intervenes where there is an exceptional change to be made? Is that true?
A. Oh, no; I did not say that. I said that he always does in a case where he goes as far as you have just stated, beyond a sixteenth of an inch. On finishing that would be generally, a sixteenth of an inch would be only surface finishing which would not change the form or shape of a model.
Q. He would not insist on being present when it was done?
A. No, not all the time; but he would inspect it.
Q. After it was done?
A. Yes.
Q. He would not as a rule be there at the chaser's elbow while he was going over the statue?
A. Well, I could not say as a rule.
Q. You ought to say as a rule.
A. No, I could not, because sometimes one artist will be there continually, another one will be more lenient and will let it go until it is almost finished when he will come and inspect it. Another artist may not inspect it until the last thing and if it is not
31 satisfactory to him he will point out the faults and go over it and turn it down; so I could not say.
Q. Then in the high grade work the practice of artists varies in this matter of supervision, does it?
A. Certainly it does, according to the artist.

By General Appraiser WAITE:

Q. Do I understand that after the casting comes from the mold, or do you say that after the casting comes from the mold, they do more than attempt to make it conform to the original model?
A. I say when he does go that far that it is only under the direction of the artist. The artist a great many times will correct something in the bronze which he has not in the plaster; he will improve it.
Q. He will think he wants to change the expression or the face or something, and have them cut deeper than they ordinarily would so as to change the contour, the expression and style of the bust?
A. Exactly.
Q. But that is infrequent, is it?
A. Well, quite often that they do that.

Q. Do you mean to say that all cutting that does not exceed about a sixteenth of an inch is left to the chaser?

A. Not in all; I say generally; that is where they are just cutting over a large plain surface which would not require the artist's attention.

Q. Of course on the features one sixteenth of an inch might change the feature quite a good deal?

A. No sculptor would dare to change an artist's model to that extent.

Case continued for 2 weeks, Feb. 14, 1908.

32 Board of U. S. General Appraisers.

In the Matter of the Protest of B. ALTMAN & Co. No. 267,838.

Cast Bronze Figures.

Before Board No. 3.

NEW YORK, *February 14th*, 1908.

Present: General Appraiser Waite.

Appearances: Curie, Smith & Maxwell (W. Wickham Smith, Esq.), Counsel for the importers; Thomas M. Lane, Esq., Assistant Counsel for the Treasury Department.

JOSEPH MITCHELL, called as a witness on behalf of the Government, having been duly sworn, testified as follows:

By Mr. LANE:

Q. Mr. Mitchell, will you please state your business?

A. Manufacturer of bronzes, wrought iron work—architectural, statuary and ornamental.

Q. How long have you been engaged in that business?

A. Nearly thirty years.

Q. Do you manufacture bronze statuary?

A. Yes, sir.

Q. Including high grade bronze statuary of artistic character?

A. The finest that is made, I think.

Q. Have you done work for the leading sculptors of this country and elsewhere?

A. Yes, sir.

Q. Will you name some sculptors for whom you have done work?

A. We have for St. Gaudens, D. C. French, E. C. Potter, Karl Bitter, Olin L. Warner and others.

Q. Have you done any work for Mr. Ward?

A. I don't think we ever did anything for Ward.

33 Q. Have you done work for a great many other sculptors of greater or less renown than those you have named?

A. Yes, sir.

Q. Please state, Mr. Mitchell, if it is customary for sculptors to finish a bronze statue after it has come from the mold?

A. It is not.

Q. Do you know of many instances in which the sculptor has intervened and done any considerable amount of work on statuary?

A. I have never known a sculptor to touch a tool on a statue after it had been cast and finished in our works.

Q. By whom is that work done?

A. By skilled mechanics.

Q. That is the process of chasing or finishing, is it?

A. Not so much a process of chasing as of finishing. Finishing, in this case, means the removing of what we term "seams" caused by the breaking of the sand and the metal running into this seam; also the removing of joints, which comes in under the general term of restoring.

Q. Is that work as a rule done under the supervision of the sculptor?

A. No.

Q. Did you ever know of an instance in which he stood at the elbow of the chaser or mechanic and directed his operations throughout the entire thing?

A. I should answer that question, no. Sculptors have been there when the men were working and given instructions, for example, "I want as little as possible done on that work." In removing the seams necessarily some chiselling has to be done to remove these things, and it always has been and is the desire of the sculptor that his work——

Mr. SMITH: I object to this gentleman stating the desires of other people.

Judge WAITE: I hardly think that would be proper.

34 WITNESS: I might say, it has always been the instructions of the sculptor not to remove any more than possible of the seams and not to interfere with his model.

Q. Did you ever know of an instance in which the chaser would chisel out the wrinkles on the forehead of a bronze statue?

A. I have never known of it.

Q. Did you ever know of an instance in which the shoulders were shaped up in which they were too full on one side?

A. I should say that was impossible on a finished statue?

Q. Did you ever know the form or contour of the surface of a statue to be materially changed by the chasing process?

A. No.

Q. Is it customary to cover the entire surface of the statue in the chasing process?

Judge WAITE: To go over the whole surface?

Q. Is it customary to go over the entire surface of the statue in the chasing process?

A. It is not.

Q. Did you ever know the metal to be removed by the chaser to the depth of an inch on the surface of a bronze statue?

A. Never.

Q. To the depth of one half an inch?

A. No.

Q. One-sixteenth of an inch?

A. No, other than where the joints are made.

Q. Then where it is necessary to take off metal to the depth of one-sixteenth of an inch, would you or would you not say it was due to imperfections in the mold?

A. If it were decided to take off as much as that on the surface it would be due to imperfections in the mold.

Q. Would a casting in which it was necessary to take off one sixteenth of an inch over any considerable surface be a success?

35 A. I don't think there is a possibility.

Q. Suppose a casting came out of the mold and varied one-sixteenth of an inch from the sculptor's model at any particular point, would it be a success as a casting?

A. That would depend on the extent. If it is something very minute——

Q. Let us assume there is a considerable surface?

A. It would not be a successful casting.

Q. Do you ever have occasion to reproduce replicas of one subject?

A. Yes, sir.

Q. Does the sculptor as a rule inspect more than the first cast of this subject?

A. I should say no. In some instances the sculptor does not inspect it at all, the first product.

Q. Mr. Mitchell, do you know of any statuary wrought by hand from metal?

A. Yes, sir.

Q. Give us an example of that kind of work?

A. It is on top of Madison Square Garden.

Q. What is that?

A. That is sheet copper or sheet bronze.

Q. Wrought entirely by hand from metal?

A. The process there is; the model is taken from the sculptor in sections and then a zinc mold made of the different parts, and the sheet of metal is stamped into that mold——

Q. By hand?

A. No, by weight; weight coming on, by drop weight, and then it is touched up by hand, and then it is soldered together. Then another example is a statue of Mercury at George Gould's place down at Lakewood; and then we recently made a large quadrig- for

36 the St. Paul, Minn., State house.

Q. Is statuary wrought by hand from metal as this statuary ever hammered out of sheets of bronze?

A. Completely by hand?

Q. Yes.

A. No, I never knew of an instance of that kind.

Q. Is it punched into these molds by hand?

A. It is stamped both by hand and machine. The machine is used to bring out the heavier parts, the larger parts, and there may be some little work done by hand after.

By Judge WAITE:

Q. The mold is made out of zinc, is it?

A. Made of zinc, yes, sir. Or it may be made of brass if they have to make a number of them. In making only one figure we generally make the mold of zinc, put some hardening material in that, you know, which makes it pretty hard, hard enough to stand the blows for making one figure. If they are going to make a number of figures that would break, and they make the mold of brass or harder material. All of these brass placques you see sold in the stores, in Altman's or Macy's, or figures they make in iron dies or brass.

Q. Is the term wrought iron, wrought bronze, wrought metal, one of common use among metal workers and founders?

A. Wrought bronze is not a term that is used in the foundry at all.

Q. Is wrought metal a term used among metal workers or founders?

A. Wrought metal, we have that term applied to architectural work—architectural ornamental.

Q. What kind of work is wrought metal work?

A. Wrought metal work is metal work made from drawn bars principally and sheet metal.

Q. Is the sheet metal work wrought or hammered into shape as a rule?

37 A. No, as a rule we have that done in the shape of molds.

By Mr. SMITH:

Q. What is the name of the firm or corporation or business enterprise with which you are connected?

A. John Williams, Incorporated, is the name of the company.

Q. How long has that been its name?

A. It was incorporated within the last three years. Previous to that it was a simple partnership under the name of John Williams.

Q. How long was that the case?

A. Nearly thirty years; between 25 and 30 years.

Q. What is your connection with that establishment?

A. I am vice president.

Q. Has it a place of business in the City of New York?

A. Yes, sir, their place of business is—I don't know as I know the number, it occupies seventeen city lots—I have a card here. It is 556 West 27th Street. That is the office.

Q. Is that the foundry?

A. We have the foundry there, yes.

Q. Is that the only foundry you have?

A. Well, we have, I might say three foundries in one.

Q. Are all the foundries where your work is done up here at this place that you have mentioned?

A. All our work is done at this place, yes, sir.

Q. You say you are the vice president?

A. Yes, sir.

Q. How long have you been that?

A. Since the incorporation.
Q. Prior to that what was your position?
A. One of the firm of John Williams.
Q. Did you say you had a card, a business card?
A. Yes, I had a business card.
38 Q. Then you said you wanted to look at the card?
A. Simply to get the number.
Q. Have you got the business card there?
A. Yes. (Card handed to counsel.)

The card is offered in evidence, admitted and marked Exhibit 1, 267,838, Feb. 14, 1908.

Q. Now you said that your firm or corporation had made bronze statues for E. C. Potter, Karl Bitter, Augustus St. Gaudens, and Olin Warner?
A. Yes, the late Olin Warner, and D. C. French.
Q. How recently have you made any statues for any of those persons?
A. Karl Bitter's equestrian statue of Gen. Siegel is the last one.
Q. How long ago was that?
A. That was unveiled within the last six months.
Q. You mean the statue of General Siegel by Karl Bitter which was unveiled a few months ago in the City of New York?
A. Yes, sir.
Q. Now, taking that as an illustration, will you tell us just exactly what you had to do with Mr. Karl Bitter from the beginning to the end with reference to that statue? To start with, Mr. Karl Bitter drew a design, did he?
A. Karl Bitter made a model to start with. He submitted drawings and asked us for how much we would furnish the finished statue in place.
Q. Then he made a model and you made a model, a clay model?
A. No, he makes the first clay model, a plaster model from that, and delivers to us the plaster cast.
Q. That is, after he had secured from you an estimate of what you would make the statue for, the next thing you had to do with him is he furnished you with a plaster cast, is that right?
A. Yes, sir.
39 Q. He sent it up to you?
A. That's right.
Q. Then, having the plaster cast you went ahead and prepared the molds and put in the molten metal and took out the statue, is that right?
A. That's right.
Q. I presume it was taken out in parts?
A. In pieces, the different parts.
Q. And you put those together?
A. Yes, that's right.
Q. During all that proceeding was Mr. Bitter there?
A. No.
Q. Was not there at all?
A. You mean during all the time——

Q. At any time while this was going on was he there? I don't mean that he was there all the time, but was he there at any time while that was being done?

A. He did not come there until after—he came there to look at the plaster cast; part of it had been broken. That is, he saw certain parts that were broken and directed his men to do certain repairs to the plaster cast before it went into the sand. After it was put into the sand and the castings were made. To the best of my recollection now, Carl Bitter did not come there until the whole work was assembled. Then he came to direct the position of the reins of the horse.

Q. So that after he had come there to attend to the repairs to the cast which had been broken, you then went on without Mr. Bitter being there until the parts of the statue had not only been taken from the mold but had been assembled together. Do you mean by assembling together, putting into various places so as to make——?

A. I mean after the casting was made of the various parts they then are sent down to what we term the chasing department for the purpose of having these seams removed. The seams are what we term technically cores, or piece cores. For instance, where a man is casting a hand, to get underneath there (illustrating with his hand) he has got to put sand in there, they have to be pieces in order to make it so as to get the pattern out, the plaster. Those are what we call piece cores, and wherever one of those piece cores are there is a little seam shown on the casting because those pieces cannot be put back without leaving little crevices where the metal will go in. When those castings are made those pieces are sent up to the chasing room, the different parts, and those little seams are removed. Then the statue, or the different parts, are taken to our assembling or fitting department and there fitted together.

Q. So as to make a statue?

A. So as to make a statue.

Q. Now between the time that Mr. Bitter had been there to see to the repair of the cast and the time after all this work had been done and the parts were put together, you say Bitter was not there at all to your knowledge?

A. To my knowledge. If you will permit me to ask my son——

Q. No, you testify separately. I cannot use but one witness at the same time.

A. To my knowledge he was not.

Q. After they had been put together he came there, did he?

A. Yes, sir.

Q. Now tell us what he did when he got there?

A. I cannot tell you what he did because I was not present.

Q. You did not see him?

A. I did not see him.

Q. And you don't know what he did?

A. I don't know what he did other than to give instructions to my foreman. He told them he wanted a little change made in the droop of the reins or something of that kind. The work was practically finished.

41 Q. In other words, as far as you know, with the exception of suggesting some little change in the reins or the position of the reins, Mr. Bitter had nothing to do with this statue after the time that he attended to the repairing of the cast, except to come there when it was assembled into parts and look it over and make the suggestion that you have referred to—is that right?

A. That's right.

Q. Now, do you say that in the case of any statue that you have made for E. C. Potter, Augustus St. Gaudens, Olin Warner or D. C. French, that they had no other connection with the proceedings than what you have described Mr. Bitter as having had in connection with this statue of Siegel?

A. I cannot make a general assertion as to that, no, sir.

Q. Are you willing to swear that you never saw or knew of any one of these sculptors whom I have mentioned, himself touch up a statue made upon his model, or having changes other than seam and joint changes made by any skilful workman under his personal supervision or direction?

A. I will swear to that as far as my knowledge extends.

Q. This statue that we have been talking about is a very large statue, either life size or heroic size?

A. It is not heroic, it is about a little more than life size.

Q. Is that the kind of statues you generally make?

A. That I don't quite understand. It is bronze statue.

Q. Were the statues that you have made for these various sculptors that you have mentioned statues of that size and on that scale generally?

A. Most generally, yes, sir.

Q. Is it any part of your business to make small statues?

A. Yes, sir.

42 Q. How small?

A. Well, we have made them from very minute statues, We have done that kind of work for Tiffany for years and years.

By Mr. LANE:

Q. I hand you a copy of a work entitled "American Art in Bronze and Iron" and ask you if that is your catalogue?

A. That is one of them, yes.

Q. Are the illustrations in this book all representative of work done by you

A. Yes, sir.

Q. And are they representative of the class of bronze statues or statuary cast by your firm?

A. Yes, sir.

Q. Would the statements that you have made with regard to the method of producing these statues apply to the work represented by these pictures?

A. They would.

Catalogue is offered in evidence, admitted and marked Exhibit 2, 267,838, February 14, 1908.

Q. Mr. Mitchell, please look at the photograph I now hand you

and state whether that represents the statue of Gen. Siegel about which you have just testified?

A. Yes, that is it.

Photograph is offered in evidence, admitted and marked Exhibit 3, 267,838, February 14, 1908.

Q. Please look at the photograph which I now hand you and state what that represents?

A. That represents a statue termed "The Terry Ranger," Texas. It was modelled by P. Capini, and erected at Austin, Texas.

Q. Is the statue in bronze

A. Cast bronze.

43 Photograph is offered in evidence, admitted and marked Exhibit 4, 267,838, February 14, 1908.

Q. Was this statue represented by the Exhibit 4 cast and finished in your foundry?

A. It was.

Q. Did the sculptor supervise the chasing and forming of it or do any work on it himself whatever?

A. The sculptor was in Texas at the time the statue was made.

Q. Did he see the statue before it was finished and taken out of your works ready to be erected?

A. He did not.

Q. Was there ever any complaint as to the character of the work done?

Mr. SMITH: I object to that.

Question withdrawn.

Q. Mr. Mitchell, whether speaking of heroic statues or small figures, has your experience been any different in the matter of the degree of supervision exercised by the sculptor?

A. Please repeat that.

Q. (Read by stenographer.) Whether speaking of heroic statues or small figures, has your experience been any different in the matter of the degree of supervision exercised by the sculptor?

Mr. LANE: As between these two classes?

WITNESS: No.

Q. Is the chaser as a rule merely a skillful artizan or is he a sculptor?

A. He is a very skilled artizan.

Q. Is it the touch with the chasing tool or the touch of the artist on the original model that gives the statue its character?

44 A. The touch on the original model which has to be retained as much as possible.

Q. Does the sculptor as a rule object to any considerable degree of modification or change in the bronze cast after it is removed from the mold?

A. Most decidedly he does.

By Mr. SMITH:

Q. When you say he objects to changes being made you mean he

objects to changes being made by your workmen on their own initiative, do you?

A. I have never known a sculptor to have any changes made in a bronze figure or statue.

Q. Did you ever know of an instance where such changes had been made and the sculptor objected to them—yes, or no?

A. I should say no.

Q. Did you ever know of an instance where he had reason to suppose such things were going to be done and he made an objection to it—yes, or no?

A. I should say no.

Q. Then what did you mean by saying he objects? Explain what you meant by saying as a rule the sculptor objects?

A. I can explain that very readily. By instructions which he gives by saying "I don't want this done" or "I don't want you to do any more than remove those seams". He objects to us doing anything more than show his handiwork.

Q. Then when you say he objects as a rule, that is what you mean. This last answer covers what you mean?

A. That is what I mean.

Q. Will you explain the purposes of this small figure of a man on the Exhibit 4?

A. I don't think it had any particular purpose other than to show the comparative size of the statue with the man.

45 Q. Does that figure appear on the finished statue?

A. It does not.

Q. It is only put in this photograph?

A. This photograph is one of our workmen in our foundry.

Q. Do you happen to know as a matter of fact whether that photograph correctly represents the proportions between the size of the workman in your foundry and the size of the figures in this statue as it is erected in Texas?

A. Not other than the fact that the photograph of the man and the horse was taken in our establishment.

WILLIAM D. MITCHELL, called as a witness on behalf of the Government, having been duly sworn testified as follows:

By Mr. LANE:

Q. Are you connected with the firm of John Williams?

A. I am.

Q. What is your connection with that firm?

A. Secretary and Treasurer.

Q. How long have you been in the business of founding bronzes and brass—in the wrought metal business?

A. Over twenty years.

Q. Have you had practical experience in supervising the work done in the foundries during that time?

A. Yes, sir.

Q. Are you in touch with the casting of bronze statuary as done by your firm?

A. Yes, sir.
Q. Do you see the statues turned out of the molds?
A. Yes, sir.
Q. Come in contact with the sculptors?
A. I do.

Q. Do you know as a rule what participation the sculptor
46 takes in the 'urning out of a bronze figure in your foundry?
A. Yes, sir.

Q. Please tell us if it is the rule that the sculptor does any work on the casting after it is removed from the mold?
A. It is not the rule.
Q. Have you actually known a sculptor to do such work?
A. Not as a rule.

Mr. SMITH: I submit, that is not an answer to the question.

Q. (Repeated.) Have you actually known a sculptor to do such work?
A. I have.
Q. Is it a frequent occurrence?
A. No.
Q. Is it a rare occurrence?
A. Yes, sir.
Q. Does the sculptor as a rule exercise any supervision over the chasing?
A. No.
Q. Does he often see it before it is finished?
A. Not often.

Mr. SMITH: I would like to know what that question means. Do you mean that the sculptor of any one statue sees that statue often, or do you mean that taking the whole range of sculptors he knows it is unusual for them to see it.

Mr. LANE: I am asking him generally. My previous questions intended that.

Q. Is it the rule that sculptors supervise the finishing and chasing of a bronze statue?
A. No.
Q. In the production of replicas of one subject does he even attempt to see the replicas after the original cast, as a rule?
A. No.

47 Q. Did you ever in your whole experience know of an instance in which the chaser under the supervision of the sculptor, or the sculptor himself, chiseled out the wrinkles in the forehead of a bronze statue?
A. No.
Q. Did you ever know of an instance in which the shoulders were too full on one side and were shaped up by the chaser or by the sculptor?
A. Never.
Q. After the statue was cast?
A. Never.

Q. Does the chasing as a rule cover the entire surface of the statue?
A. It does not.
Q. What is it confined to, generally speaking?
A. Removing the protuberances or excrescences due to the method of sand molding—incident to the method of sand molding, and the restoring of such places to copy or the similar part or portion of the original.
Q. Is that all done by the chaser?
A. Yes, sir.
Q. Did you ever know of metal to be removed to the depth of an inch?
A. No, sir.
Q. To the depth of half an inch?
A. No.
Q. One sixteenth of an inch?
A. No—that is to say, over any considerable surface.
Q. Suppose you had to remove one-sixteenth of an inch over a considerable surface of the statue, or an expression, would the casting be a success?
A. It would not.
Q. Did you ever have a cast of that kind, that you recall?
A. Not to my knowledge.

By Mr. SMITH:

Q. You are related to the last witness who testified?
A. Yes, sir.
Q. How?
A. Son.
Q. How old are you?
A. Thirty-nine years of age.

By Mr. LANE:

48 Q. Please look at this Exhibit 3, representing the statue of General Siegel erected in this city. Are you familiar with the circumstances under which that statue was produced?
A. To a certain extent.
Q. Do you know how much participation Karl Bitter, the sculptor, had in casting and finishing that statue?
A. In a general way.
Q. Did you hear what Mr. Joseph Mitchell testified to with regard to that statue?
A. I did.
Q. Do those facts conform to your knowledge?
A. Yes, sir.
Q. Are you able to state whether Mr. Bitter actually directed the chasing and finishing of that statue other than suggesting a slight alteration in the reins which has been referred to?
A. He made no—he made no supervision of the chasing or the work. His part that he had was to see what had been done and to accept it or reject it as he might choose.

Q. Do you know of any change that was suggested by him other than those changes in the reins?
A. I do not.
Q. Would you be apt to know?
A. I think so, yes.

ARTHUR MERRITT, called as a witness on behalf of the Government, having been duly sworn testified as follows:

By Mr. LANE:

Q. Will you state your business?
A. I am connected with the Henry-Bonnard Bronze Company.
Q. Please state their business?
A. Casting of statuary and ornamental work, all bronze
49 and brass work.
Q. You cast bronze statuary?
A. Yes, sir.
Q. Is your business in that extensive?
A. Very.
Q. Are you as a matter of fact the largest bronze founders of statuary in this country?
A. I believe we are. That might be a matter of some question but we have done a great deal in that line.
Q. Have you cast bronze statuary for the leading American and other sculptors?
A. We have.
Q. Will you mention the names of some of the sculptors?
A. St. Gaudens, French, Adams, Martiny, Ward. Those are well known. I can add to that if necessary.
Q. Done anything for Macmonnies?
A. No, we have not done anything more than repair his large reliefs for the Brooklyn arch which were damaged in transportation.
Q. Is your work practically confined to the work of these high class sculptors you have named?
A. Well, we do work for all sculptors, high class and otherwise.
Q. Do you do considerable work for sculptors less well known than these men?
A. Yes, sir.
Q. Please tell us, Mr. Merritt, what your experience has been with regard to the amount of work done by a sculptor of bronze statuary after it has come from the mold. Does he as a rule do any work upon it himself?
A. No.
Q. Is that true whether speaking of these men you have named or less renowned men?
A. Of all.
Q. Does the sculptor as a rule exercise any close degree of supervision over the chasing or finishing of the statue after it is molded?
A. Comparatively little.

50 Q. When you say comparatively little, do you mean as a rule he does some supervision?

A. He will visit the foundry and look at the cast and sometimes make some slight suggestion that the finish here and there done by the chaser is not quite satisfactory, but one or two visits to the foundry after casting would about cover it.

Q. Does he ever stand at the chaser's elbow and direct his work?

A. Some very few instances.

Q. Are those rare?

A. Very rare.

Q. Are the instances frequent in which he does not supervise the work at all?

A. Yes, sir.

Q. Do you frequently cast a number of replicas from one subject?

A. Very often.

Q. Does the sculptor as a rule pay any attention to the replicas after inspecting the original cast?

A. Very rarely.

Q. By whom is the finishing and chasing of the bronze statuary done?

A. By the cnaser in the employ of the foundry where the cast is made.

Q. Are they sculptors or merely high-class workmen?

A. High class workmen I should call them.

Q. Is the work done on a bronze statue by the chaser applied to any feature of the statue which characterized it and embodied the artist's idea, as a rule?

A. No.

Q. What do they do?

A. Simply the removing of the seams and possible excrescences in the casting.

Q. Do you ever have instructions from sculptors which indicated that they wished a slight degree of work done after the casting is out of the mold?

51 A. They object to that.

Q. What are their instructions with regard to finishing and chasing, as a rule, if they give any?

A. To absolutely not interfere in any way with their model; that is, to reproduce or cast as closely as possible their model and keep the chaser off.

Q. Did you ever know of an instance in which the wrinkles on the forehead of the statue and folds of the garment were chiseled out after the statue was cast?

A. No, I never have.

Q. Did you ever know the shoulders to be shaped up after the casting came out of the mold?

A. What do you mean by "shaped up"? I don't quite understand your question. If you mean the form changed by the chaser——

Q. I will read to you a question and answer which passed at the last hearing:

"Q. Well, this work done by the artist is confined so far as you

have observed, to matters of detail, is it not, for example, like the wrinkles on the forehead?

"A. No, it is the entire thing. The shoulders may want to be shaped, they may be too full on one side; or the face must be chased also, and the expression, the arms, the hands, the fingers".

Now let me ask you if you ever knew of an instance in which it was necessary to touch up the statue to that extent after it came from the mold?

A. No, I have not.

Q. How does it impress you as a practical proposition?

Mr. SMITH: I object to that question.

Objection sustained.

Q. What would you say of a bronze cast in which such work was necessary?

52 Mr. SMITH: Objected to.

Judge WAITE: That is a little too indefinite. The objection is sustained.

Q. If you turned out a cast on which such work as that was necessary, what would you do with it?

Objected to by counsel for the importers as being a hypothetical question based on a state of facts the witness has entirely testified he never knew to exist.

Objection sustained.

Q. In your opinion as a practical bronze founder, would a cast of that kind be successful?

Mr. SMITH: I object to that.

Judge WAITE: Would a cast of that kind be successful, where it varied so much from the model?

Mr. LANE: Precisely.

Judge WAITE: I think that would be proper.

WITNESS (answering question): No, I should say not.

Q. Did you ever know of half an inch to be removed from the surface of the bronze statue either by the chaser or the sculptor?

A. No. You would go through the cast.

Q. That would go through the cast, would it?

A. Yes, sir.

Q. Did you ever know a chaser or a sculptor to take one-sixteenth of an inch off any considerable degree of surface?

A. No.

By Mr. SMITH:

Q. Have you with you a business card of the establishment which you are connected with?

A. I believe I have one. (Witness produces the card.)

Mr. SMITH: I offer the card in evidence.

Mr. LANE: I object to its admission——

53 Mr. SMITH: All right. The offer is withdrawn.

Q. When you stated that a couple of visits to the foundry would be about all that would be usual or necessary after the sculptor has furnished his plaster model to the founder, did you intend that testimony to refer to such sculptors as Mr. St. Gaudens, Mr. Olin Warner and Mr. D. C. French?

A. Yes, sir.

EDMOND W. BUREAU, called as a witness on behalf of the Government, having been duly sworn testified as follows:

By Mr. LANE:

Q. Will you please state your business?

A. Why, bronze founders.

Q. With what firm?

A. The firm of Bureau Bros., Philadelphia.

Q. What is the character of their business?

A. Casting statuary, architectural works, and bronze and brass castings of all descriptions.

Q. Is the casting of bronze statuary a prominent feature of your work?

A. That is a prominent feature of our work.

Q. Tell us how long you have been in that business?

A. Since 1864.

Q. Have you during that time been actually engaged in casting bronzes yourself?

A. Yes, sir.

Q. Are you a practical workman?

A. I am a practical workman in that line.

Q. Did you cast bronze statuary for eminent American sculptors?

A. We have, sir.

Q. Please name some of the sculptors for whom you have done work?

A. J. Q. A. Ward, Louis Thomson, D. C. French, Karl Bitter, Charles Graffly(?), E. C. Potter and quite a number of
54 others if you want me to name them.

Q. That will be enough. Do you cast both statues in heroic size and those of smaller size?

A. Yes, sir, cast them from miniatures up.

Q. After the bronze casting is taken out of the mold does the sculptor as a rule come to your shop and do any work upon it, speaking with reference to the work generally?

A. Not generally.

Q. Does he as a rule supervise it?

A. I have never known him to supervise it.

Q. Has he ever stood by the chaser and directed his work to any considerable extent?

A. In one or two cases.

Q. Are those instances rare?

A. They are rare.

Q. Does he or does he not, as a rule, leave the matter of finishing and chasing the statue entirely in your hands?

A. When we receive the model our instructions are generally to make as fine a casting from that model as can possibly be gotten up, and to have as little chasing done upon it as can be done.

Q. Do you frequently make replicas covering a given subject?

A. Yes.

Q. Does the sculptor as a rule pay any attention to the replicas?

A. Well, sometimes they will ask us to be very careful with the first cast, from the model or pattern as they generally call it, and after that is made he does not give it any more attention whatever; depends on our ability to turn it out as his model.

Q. Did you ever know of any of the sculptors whom you have mentioned or any sculptor for whom you have done work, to make any change involving the removal of as much as one
55 half inch metal over any considerable portion of the surface of a statue?

A. Mr. Lane, I don't see how they can take off half an inch because most castings are cast from one-quarter to three-eighths of an inch in thickness.

Q. Is the removal of one-sixteenth of an inch a thing——?

A. I have never known them to take off one-sixteenth of an inch—that is, over any considerable surface.

Q. When they do take any off what does it consist of?

A. Wherever the joints of the statue come together, wherever you have a joint, there is always a little edging left wherever they join it together, mold or swedge the statue together, and they have to take off sometimes one-sixteenth of an inch.

Q. Those are mere protuberances.

A. Yes, sir, protuberances. It is made there on purpose to close the joints.

Q. Do they ever go into the surface any depth at all?

A. Not to my knowledge.

Q. What are the tools used by the chaser?

A. Why, a small steel tool like a chaser matt, a chaser riffler file.

Q. A riffler is a file, is it?

A. It is a file made of a long piece of steel, by a curve, with teeth cut in like the teeth of a file.

By Mr. SMITH:

Q. Can you mention by its subject, place where it is erected or exhibited or any other way so as to identify it, any statue that Bureau Bros. have ever made for J. Q. A. Ward?

A. You want me to answer that question, sir?

Q. Do you suppose I asked that without intending to have an answer?

A. My father made statues under the name of Robert
56 Wood & Company when he was superintendent for Robert Wood.

Q. Your father did?

A. Yes, sir, that was from 1860 to the '70's. Then in 1879 Bureau Bros. & Eaton made a statue of John Thomas, erected in Washington, D. C., for J. Q. A. Ward.

Q. What were you doing in 1879?
A. I was an apprentice at that time, sir.
Q. Where—in this bronze foundry?
A. In that bronze foundry on that very same statue.
Q. And the knowledge that you have of what the sculptor had to do with that particular statue is such knowledge as an apprentice has in working in the foundry, is that right?
A. On that one statue, yes.
Q. And that was ten years after these other statues that your father, you say, had made for Robert Wood?
A. Yes, sir.
Q. Will you mention so as to identify it either in place or any other way so that we can know it, any statue which Bureau Bros. made for D. C. French.
A. Any statue that Bureau Bros. made for D. C. French?
Q. Yes.
A. Well, we made the bust of Postmaster Pierson erected down here in the Post Office.
Q. Any others?
A. General Grant in Fairmont Park, Philadelphia.
Q. What is that—a bust or a life size statue?
A. An equestrian figure of General Grant. E. C. Potter was the associate sculptor on that.
Q. But Mr. French was the sculptor, was he?
A. Yes, sir.
Q. Where was that work done that you speak of, this equestrian statue of General Grant?
A. At our foundry, the southwest corner of, 21st and Alleghany Avenue, Philadelphia.
57 Q. When was that done?
A. Give the exact date.
Q. Approximately—I don't ask the exact date.
A. Done about ten years ago.
Q. What position were you occupying there then?
A. I was one of the firm, sir.
Q. Down at the foundry?
A. Yes, sir.
Q. You say that as to that statue neither Mr. French nor Mr. Potter had any more to do with it than to furnish the model?
A. That is all.
Q. Now tell us any statue that you made—did you mention St. Gaudens? I don't remember whether you did.
A. I did not, but we have done work for St. Gaudens.
Q. Lately?
A. Not lately.
Q. How lately?
A. We made Captain Randall, at Snug Harbor.
Q. How about Karl Bitter?
A. Karl Bitter—made a couple of busts for him.
Q. When?
A. We made one about a year ago.

Q. Is it exhibited—do you know?

A. A private exhibit. Then we have made some panels for him in New York City if you want to see them, the framework around the "Tomb's Angel", Mrs. Forster, erected here in the Tombs. We made the frame-work for her.

Q. Can you name a prominent public statue similar to the statue of General Grant in Fairmount Park that you have made for either St. Gaudens or Bitter?

A. For a private monument, in Montpelier, Vt., for Mr. Bitter, of Artemis, erected in a cemetery.

Q. That was erected in a cemetery at Montpelier, Vermont?

A. Yes, sir.

Q. Is it a life size statue?

58 A. Yes, life—over life size.

Q. When was that?

A. About three years ago, in that neighborhood. I cannot give the exact dates.

Q. Mr. Bitter had no more to do with that statue than you have already described with reference to all these statues generally?

A. No, sir.

By Mr. LANE:

Q. Please state if you are in touch with all the statuary turned out in your foundry?

A. Yes, sir.

Q. You see everything brought in there?

A. It is under my supervision.

Q. Do you see the actual work of casting and chasing and finishing in every instance?

A. I do practically. I have it all under my supervision. My brother has the finishing department.

Q. Mr. Bureau, have you seen a Japanese bronze statue of a monkey shown in two stages, both the finished and unfinished stage, in a collection of Japanese bronzes in Memorial Hall, at Philadelphia?

(Counsel for the Government states for the purposes of the record that the figures are numbered '05.38 and '05/39.)

A. Yes, I saw them there, but they are not bronze, they are iron.

Q. Are you able to state from an inspection of those figures how they were produced?

Mr. SMITH: I object to that. How can a man here in America be able to tell how Japanese goods were produced.

Mr. LANE: I asked him if he could tell from an examination.

59 WITNESS: As far as my knowledge would go I will tell you just how I think they were produced. I am able to state that it is hammered up in iron, done by hand.

Q. Would it be in the same condition or form it is now if it was cast?

A. No, sir, it would be much heavier.

Q. Could you make a casting of as thin a substance as those figures?

A. We never like to try it.

Q. Could it be done in a practical way and be successful?

A. Not that I know of in the present time.

Mr. LANE: We propose to offer photographs of the figures in evidence to illustrate the other way of making bronze statuary, hammered work.

Q. It is made the same as the quadriga?

A. Yes, in the same way, but this is a little finer kind of work, much finer.

Q. Do you know of any examples of statuary wrought by hand from metal?

A. You have got a fair example here, the statue of Liberty, down here in the harbor, and there is the statue on the top of Madison Square Garden, the weather vane, statue of Diana. That was made by Muller, of Salem, Ohio.

Q. Are there a number of foundries engaged in making sheet metal statuary in this country?

A. Yes, there are quite a number of them.

Q. Do I understand that it involves the hammering out of sheet metal in sections to the required shape?

A. Yes, sir.

By Mr. SMITH:

Q. Tell us how the Bartholdi statue was made.

A. That was hammered up out of sheet copper, about number 12 or 14 gauge.

60 Q. What do you mean by hammered up out of sheet metal. Just explain how that is done. When you have sheet metal, you mean plain surface metal, the same as the top of this metal.

A. Yes, that is what I mean.

Q. How thick?

A. I said, from 12 to 14 gauge; that is about as thick—a little thinner than our old two cent piece.

Q. That is about a thirty-second of an inch?

A. A little heavier than that.

Q. One-sixteenth?

A. A little over one-sixteenth; between a sixteenth and three thirty-seconds.

Q. A little over one-sixteenth of an inch in thickness?

A. Yes, sir. The first thing they do is to produce the model, make the model in plaster, then you get the sheets of copper and bend them; first hammer them into shape either in the mold or by hand.

Q. How can you hammer it in the mold?

A. You can make them in the mold, sir.

Q. Tell us how you make the forms in the mold?

A. Just like you would brass.

By Mr. LANE:

Q. When you speak of a mold do you mean a positive mold rather than a negative mold?

A. Well, the mold is the form or shape you want it.

Q. Over which they hammer these metal sheets?

A. Over which they hammer these particular sheets. Some make the casts in cement so as to get a hard surface. They work right over that.

By Mr. SMITH:

Q. Do you mean that a mold was made of an entire figure the size of the Bartholdi statue?

61 A. No, sir, I don't mean anything of the kind. It is made in sections, a consensus of molds made for a statue of that size. It is made in sections.

Q. How do you know that all this was done?

A. I spoke to the man that made it at the time.

Q. Who was he?

A. I could not recollect his name.

Q. Where?

A. In Philadelphia.

Q. It was made in Philadelphia.

A. No, sir, it was not made in Philadelphia.

Q. Where was it made?

A. It was exhibited in Philadelphia.

Q. Where was it made?

A. Made in Paris. It was exhibited in Philadelphia at the Centennial Exposition.

Q. You don't know the sculptor's name?

A. No, sir, I do not.

Q. You say by looking at two iron statues, of different stages of completion of the same statue in the same gallery in Philadelphia, you are able to tell how they are made—is that right?

A. Yes, sir.

Q. How are you able to tell?

A. Why, from an examination, from the description given in the catalogue.

Q. Oh, there was a description in a catalogue, was there?

A. Yes, sir.

Q. Of how they were made?

A. It explained the process.

Q. Then you are basing your testimony as to how they are made on the description in the catalogue?

A. No, simply examining the two pieces show- how the work was done. One of them is a little defective, shows by hammering it they failed to follow the model, which proves that it was done by hammering.

62 Q. Would you have been able to tell if you just looked at those two things, without the information contained in the catalogue?

A. I would, sir.

Q. You would?
A. Yes, sir.
Q. So you didn't need the information in the catalogue?
A. No, sir, I did not need it.

Jos. MITCHELL, recalled by counsel for the Government:

By Mr. LANE:

Q. I hand you a picture of the bronze statue of Governor Roger Wolcott, represented to be made by Daniel C. French, will you tell us if you cast that?
A. We did.

Picture is offered in evidence, admitted and marked Exhibit 5, 267,838, February 14, 1908.

Q. Mr. Mitchell, please state if after that statue was cast Mr. French was satisfied with the expression of the face?

Mr. SMITH: I object to that. What has that got to do with this case.
Question withdrawn.

Q. Mr. Mitchell, what if anything was done to the face of the statue after it was cast?
A. Nothing was done with the face of the statue.
Q. Was the face of the statue acceptable to Mr. French?

Mr. SMITH: Objected to. It is the same question in another form that has been already excluded. First he asked him if Mr. French was satisfied with the face and now he asked him if it was acceptable to him.
Objection sustained.

Q. Please state what change if any was made on this statue
63 of Gov. Wolcott after it was cast?

A. After the statue was cast and erected in the State House at Boston, objection was made, not by Mr. French but by some of the relatives, that the expression of the face was not to their liking; Mr. French was in doubt whether that could be done, and he decided the change could not be made except by remodelling the head, which was done. We removed the original head and put another one in its place.

Mr. SMITH: I move to strike out all that testimony upon the ground that changes made necessary in statues to meet the views of the relatives of a deceased person have nothing to do with the question of what has to be done to statuary in general as involved in this case.
Motion granted.

Q. Mr. Mitchell, did you recast the head of this statue of Gov. Wolcott?
A. We did.
Q. Was or was not that because the desired change could not be made by chasing?

Objected to by counsel for the importers on the ground that the witness has already described the entire transaction.

Judge WAITE:

Q. Could the change be made by chasing?
A. It could not be made by chasing.
Q. What was this change?
A. I could not tell you the exact change. There was some change in the mouth.
Q. The expression?
A. Yes, a change in the expression.

By Mr. SMITH:

Q. How do you know it could not be done by chasing?
A. In the first place, there is not metal enough to cut away any amount there, and the handling was such it would be im-
64 possible with metal. Metal is not a plastic material like pitch or clay. If once cut away you cannot restore it. It is a mechanical impossibility.

By Judge WAITE:

Q. It was impracticable?
A. It was not impracticable, it was impossible.

The photographs of the Japanese bronze statue referred to in the foregoing testimony are to be marked in evidence as exhibits when received.

Two weeks granted counsel to file briefs.

NEW YORK, *February 28th*, 1908.

Counsel for the Government offers in evidence the photograph of the hammered statues referred to in the testimony of Mr. Edmond Bureau at pages 61 to 63 and pages 65 to 66 of the typewritten record. The figures are numbered '05-38 and '05-39 in the collection of the Pennsylvania Museum at Memorial Hall, Philadelphia. The affidavit of the photographer verifying the photograph and pasted on the back thereof is also offered as part of the exhibit.

Photograph and verifying affidavit of photographer received in evidence and marked Exhibit 6, 267,838, February 28, 1908.

65 Statuary.

The U. S. General Appraisers.

In the Matter of B. ALTMAN & Co.

Protest 267,838.

PHILADELPHIA, *March* 26, 1908.

Before Board No. 1.

General Appraiser Sharetts present.
Appearance: Thomas M. Lane, Esq., for the Government.
R. H. H.

EDMOND W. BUREAU having been duly sworn, testified as follows:

By Mr. LANE:

Q. Mr. Bureau, what is your business?
A. Bronze founder and caster.
Q. Did you give certain testimony before the Board of General Appraisers at New York on February 14, 1908?
A. I did.
Q. In a case involving bronze statuary, number 267,838 of Altman & Co.?
A. Yes, sir.
Q. At that hearing did you give certain testimony with reference to two iron figures forming part of a collection at Memorial Hall, Philadelphia?
A. I did, sir.
Q. I show you a photograph marked Exhibit 6, in the case, will you please state if that is a correct photograph of the two statues in respect to which you testified?
A. Yes, sir, it is.
Q. Did you actually inspect those figures before you gave your testimony?
A. I did. This is a correct photograph.

66 Board of U. S. General Appraisers.

In the Matter of the Protest of B. ALTMAN & Co., No. 267,838, on Cast Bronze Figures.

Before Board No. 3.

NEW YORK, *May 8th*, 1908.

Present: General Appraiser Waite.
Appearances: Curie, Smith & Maxwell, (By W. Wickham Smith, Esq.) Counsel for the Importers;
Thomas M. Lane, Esq., Assistant Counsel for the Treasury Department.

FREDERICK ROSENBERG, called as a witness on behalf of the Government, having been duly sworn, testified as follows:

By Mr. LANE:

Q. What is your official position, Mr. Rosenberg?
A. Examiner of merchandise in the appraiser's stores at the port of New York.
Q. In September, 1906, were you examiner of metal statuary?
A. Yes, sir.
Q. How long did you examine such merchandise at this port?
A. About four years.
Q. Are you familiar with the class of bronze statuary imported by Altman & Company at this port from Fenwick Freres & Co., of Paris?
A. Yes, sir.
Q. Were you familiar with it during the entire period that you examined bronze statuary?
A. Yes, sir.
Q. Did the statuary of that class imported by Altman & Company differ from the bronze statuary ordinarily imported at this
67 port by department stores and art stores?

Mr. SMITH: Objected to, first, on the ground that it is immaterial; second, upon the ground that we are not dealing here with a general class of goods imported by Altman from somebody on the other side, but with a particular article. It may very well be that a man may import from one house in Europe a general class of merchandise, but an article which he imported in one particular importation may be entirely different from the general class of merchandise he imports from that house. I insist that if the witness is to be examined at all he should be examined with reference to the particular article which constitutes the subject of this importation.

Mr. LANE: Just at this point, may I ask if counsel for the importers abandons his protest as to all the bronze statuary on this invoice except the single piece of Louis XVI with respect to which he took testimony at the last hearing?

Mr. SMITH: In order to simplify matters we will withdraw the protest as to all the statuary except the one in regard to which we have produced testimony.

The objection of counsel for the importers to the previous question is sustained.

Q. Mr. Rosenberg, please look at the invoice in this case and state if you passed the merchandise covered by that invoice?
A. Yes, I passed this merchandise.
Q. Will you please state whether the bronze bust of Louis XVI described as number 4214 on that invoice is of a character such as is frequently imported by Altman & Company from Fenwick Freres

68 Mr. SMITH: I object to that, and ask leave to put a question to the witness before he is further interrogated.

By Mr. SMITH:

Q. Have you any personal recollection of that article at all?
A. No, that article was not ordered to the public stores.
Q. What?
A. That article has not been in the public stores.

Mr. SMITH: I object to the question on the ground that the witness never saw the article and has no personal recollection of it.
Objection sustained.

By Mr. LANE:

Q. What was the value of that piece?

Objected to on the ground that the invoice speaks for itself.

Judge WAITE: Is it proposed to controvert the price?
Mr. LANE: I am not going to controvert the price. I simply want him to state it.
Mr. SMITH: I think it will save time to let him answer.
WITNESS: The price is 705 francs and 60 centimes.

Q. Do you frequently pass busts of that value or higher at this port?
A. We frequently do pass them at that value and probably sometimes a little higher.
Q. Are busts of that value usually works of great distinction and character?

Mr. SMITH: Objected to on the ground that the question is
69 clearly too indefinite to be answered. A bust that was worth $700. and was nine inches in height may be a great work, while a bust 700 francs in value, two feet high may be a very cheap article. The question is entirely indefinite and the witness ought not to be allowed to answer it.
Judge WAITE: About that very dimension, this particular size?
Mr. SMITH: Does the invoice describe the dimensions?
WITNESS: No, it does not.
Mr. SMITH: Then I object to the question; the witness has already testified he has not seen the article.

Q. Assuming, Mr. Rosenberg, as is already proven in this case, this was a bust measuring 23 to 24 inches high, with a base from 10 to 10½ inches square, at that value, please state if it was a bust of such distinction and character as distinguished it from the other works imported by Altman & Company, or Tiffany & Company and other department stores?

Mr. SMITH: Objected to on a great many different grounds. In the first place I claim no basis has been laid for questioning this witness as to the range of statuary as works of art——
Mr. LANE: I am not questioning him on that point, I am asking him if that differs from other works, similar, that are imported frequently.
Judge WAITE: Differs in quality, style or material?

Mr. LANE: I asked him whether it had any such distinction and character as to distinguish it from these others.

70 Mr. SMITH: And I object to it on the ground that the witness cannot tell by the dimensions of an article which he has never seen whether it is a work of distinction which distinguishes it from other works of not. He has no knowledge on which to answer the question.

Judge WAITE: I don't see how he can.

Mr. SMITH: I object on the further ground that the whole testimony sought to be elicited is clearly irrelevant under the paragraph of the law involved in the determination of this question, which makes no reference to works of art of distinction or anything else.

Objection sustained.

Q. Mr. Rosenberg, have you ever seen a bust of Louis XVI about the size I have described to you, imported from Fenwick Freres?

A. I could not say that they were imported from this firm, but I have seen similar statuary.

JOHN HENRY BUCK, called as a witness on behalf of the Government, having been duly sworn testified as follows:

By Mr. LANE:

Q. Mr. Buck, what is your professional connection?

A. I am at present curator of metal work at the Metropolitan Museum of Art.

Q. How long have you been curator of metal work at the Metropolitan Museum?

A. A little over two years.

Q. What was your business prior to that time?

A. I was with the Gorham Company for nearly twenty years as manager of a department that related to ecclesiastical metal work principally.

71 Q. During the 20 or more years that you have been in the metal work business or connected with it in a professional way, have you made a study of the casting of bronzes and the operation of producing wrought metal work?

A. Yes, sir.

Q. Did you have occasion to do that with your experience at Gorham & Company?

A. Yes, sir.

Q. Did you have any connection with the Gorham foundry?

A. Oh, yes.

Q. In what way?

A. I was manager of the sales department of the New York store and they had a foundry also in New York before they moved to Providence, and I was down there frequently as manager of the sales department in the store.

Q. Have you made a special study of metal work in its various branches during your experience?

A. Yes, sir.

Q. Are you able to determine, Mr. Buck, from an inspection of metal work whether it is cast or wrought by hand?

A. Yes, sir.

Q. Will you please look at the Exhibit 6 in this case, representing the metal figure of an ape in the Pennsylvania Museum, and state if you have examined that piece of statuary?

A. Yes, sir.

Q. Please state in your opinion how that statuary was produced?

Mr. SMITH: Before you answer that, do you mean you went and saw the actual metal article of which this is a photograph?

WITNESS: I had both of these (figures) in my hand in Philadelphia.

Mr. SMITH: You had what?

72 WITNESS: I had both of these metal articles in my hands.

Mr. SMITH: Now, I object to this question upon the ground that it is not a proper matter of evidence in this case. The question of how a particular statue or article is produced is a question of fact to be determined by inquiring into the fact how it was produced. I submit that any inquiry of the witness as to how in his opinion it was produced is not a proper question. I further object upon the ground that the question of how these particular articles in Philadelphia referred to were produced is immaterial, and irrelevant; they are not the subject of controversy here, and any proof as to how they were made will throw no light upon this question. The question of how the articles in Philadelphia were produced is totally irrelevant and immaterial. We are concerned here with how this particular article was produced, not with how some other articles in Philadelphia were produced.

Objection overruled.

Q. (Repeated.) Please state how in your opinion that was produced.

A. Are you asking for a detail description of the method of production?

Q. I am asking you to state how it was produced.

A. A rough form in the first place was made probably out of wood of one ape; a sheet of iron was then taken, and it was hammered over that form to a certain extent. Probably it was annealed to prevent flaws and cracks showing through. One of these is what we call a "waster", after going so far with it they found it had not been properly made, had to throw it away practically, showed daylight through it in so many places it did not pay to continue the operation. The other one, the one on the right, they hammered

73 that far enough to be able to take it out of the wooden form then and snarled it up from the inside and worked it back again by hand from the other side by tooling. In fact, it had been hammered all over, and to me it seems as if it had been annealed very frequently. I imagine they used the waster as an exhibit to show the process of manufacture—the one on the left.

Q. Mr. Buck, will you please look at the photograph which I now

hand you, representing a statue of St. Sebastian, and state if you have seen the original of that statue?

A. I have the original in my care at the Metropolitan Museum.

Q. Have you examined the statue with some care?

A. Yes, sir, I had it taken to pieces and carefully examined it.

Q. Please state whether that statue is a cast piece or was it wrought by hand?

Objected to as irrelevant.

Objection overruled.

A. It has been wrought by hand.

Q. Is that what is known as repoussé work?

A. Yes, sir.

Q. What is the metal from which it is wrought?

A. Silver.

Counsel for the government offers the photograph in evidence.

Objected to by counsel for the importers on the ground that it is irrelevant.

Judge WAITE: Does that photograph fairly represent the piece?

WITNESS: That is a good photograph, sir.

Objection overruled, and the photograph is marked in evidence Exhibit 7, 267,838, May 8, 1908.

74 Mr. LANE: At this point I am going to offer some data which I recognize is not strictly evidence. The Government takes the position that it is admissible for the information of the Board. We ask the Board to take judicial notice of the fact that the art of hammering statues by hand out of metal has always existed from very ancient times, and we offer the testimony of Mr. Buck and a report made by him on the entire history of the process of making wrought metal statuary based on his experience with art metal work and his researches and study of the history of the art; and so far as the report quotes or epitomizes from various authorities it is offered as a convenient means of reference, although the authorities themselves are also offered. Some are bulky and belong to the library of the Metropolitan Museum and we would rather not leave them in the record. In fact I don't know that we can leave them here. So far as this testimony is concerned the Government wants to ask the Board, if the presiding general appraiser is inclined to exclude it, to reserve its decision in order that the Government may have a ruling of the full Board on the subject and that briefs may be filed.

By Mr. LANE:

Q. Mr. Buck, have you studied the history of art?

A. Pretty generally, yes, sir.

Q. Has it been necessary in the course of your professional connection and business to familiarize yourself with the art of empæties and repoussé work and wrought metal work generally?

A. Yes, sir.

Q. Are you familiar with the history of that branch of the art?

A. More or less, yes, sir.

75 Q. Have you made it a special study in your experience?
A. Yes, sir.

Q. Did you at the request of the counsel for the Government make a report upon the history of wrought metal work?

A. Yes, sir.

Q. Is the report which I show you the report which you made?

A. Yes, sir.

Q. Is that based upon your studies and research and experience in connection with wrought metal work as curator for the Metropolitan Museum and with Gorham & Company?

A. Yes, sir.

Mr. LANE: The report is offered as an aid to the information of the Board.

Mr. SMITH: I object to this paper on the following grounds: First, no foundation has been laid for assuming this witness to have any qualifications to make a report upon the history of art or of the history of the making of statuary; second, the so-called report is not and does not purport to be a report prepared by the witness at any time prior to the inception of this controversy in the ordinary discharge of his official duties or addressed to either of the concerns with which he has sworn he has been identified. He has testified that he prepared it at the request of the Government counsel in this case. It is dated March 21, 1908, and is addressed to Mr. T. M. Lane, and it recites that it is an answer to a letter containing inquiries by this government counsel for the opinion of this witness. For example, one of the questions recited is "Can the provision (of the tariff act) quoted be applied to cast bronze statuary?",
76 and the second, "is there a class of metal statuary extant which answers the description of statuary wrought by hand from metal?"

Mr. LANE: Just at this point let me say that we offer the report only upon the answer to the second question. The first we eliminate.

Mr. SMITH: It therefore clearly appears to me to be an attempt to substitute for the testimony of a witness based on his own knowledge and experience a report prepared by him at the request of counsel to the proceedings with reference to the particular questions that are in controversy here, and I submit that no such document as that can be received as evidence in any controversy about the classification of merchandise.

Mr. LANE: At this point I reiterate my statement that this document is offered as an aid to the memory of the court; it is a recital of historical facts and in concise form, and it refers to the authorities. The art of metal work like any other art must be investigated by the court by reference to existing authorities so far as its history is concerned. I don't hesitate at this point to state that I think the authorities on the subject of judicial notice amply sustain the Board in accepting documents of this kind, especially in so far as it quotes or epitomizes from authorities. I won't take up the court's time by a reference to them.

Judge WAITE (to importers' counsel): Do you wish to ask the witness any questions as to his researches——

Mr. SMITH: Yes, I will ask him some questions.

77 By Mr. SMITH:

Q. When did you leave the Gorham Manufacturing Company?

A. About four years ago.

Q. When did you take your present position?

A. About eighteen months after, I think it was.

Q. You say that in your position in the Gorham Company you were in charge of the sales department of statuary?

A. No, I did not say that.

Q. Then I misunderstood you. Tell me what the fact is about it—what was your position there?

A. I was manager of the church department, church metal work, and during that period they started a bronze foundry and I was in charge of the sales department of the metal work, of all their ecclesiastical metal work and bronze and brass work.

Q. Not statuary?

A. No, I didn't say anything about statuary.

Q. Did you or didn't you have anything to do in your position with the Gorham Company with statuary, and if so what?

A. Statuary would naturally come under the head of bronze work. It was principally statuary.

Q. When was it you began to take charge of the sales department of the store?

A. About two years before I left.

Q. Which would be about six years ago?

A. Yes.

Q. Prior to that your function or position had been to take charge of the manufacturing of ecclesiastical metal work?

A. Designing it and having it made at the factory—practically taking charge of it.

Q. What you designed and had made at the factory was cast, was it?

A. Some cast and some wrought.

78 Q. Now, do you wish to testify here that at the time when you were with the Gorham Company you were called upon to or did in fact make any study of the history of metal statuary?

A. Naturally, yes, sir.

Q. You did?

A. Yes, sir.

Q. And how did you make it—where did you make it—from what sources did you make it?

A. We had a good library of our own, and then there was the Astor Library and the Lenox Library, and so on, text books, and so forth.

Q. Ecclesiastical metal work. Tell us what that means, please?

A. Fontal vessels of silver and gold of all dimensions, lecterms, screens, etc., bronze tablets.

Mr. SMITH: I submit, in the first place, that on his own testimony this witness is not competent to testify as an expert; and second, that if he were or if he were the best expert that could be produced in the world, he should be examined and testify from his knowledge; and that there should not be put in here a report prepared eleven years after the enactment of the tariff act in a pending litigation the request of counsel for one of the parties.

Judge WAITE: If there is any excuse for this going in as testimony it would be as an aid to the court and as a résumé of the important parts of the history of this class of art. I don't think it would be admissible so far as it contains what might be called a construction of the law.

Mr. LANE: We offer it for no such purpose. We have the authorities in court; they are very bulky books, and they can be referred to in the Metropolitan Museum library or any other library.

79 Judge WAITE: I am not very fresh upon the question, but my recollection is that there is authority for the admission of testimony such as you have incorporated in your offer. The only question in my mind is as to whether this exhibit which you offer is in that form which should be admitted here. (To the witness:) You are familiar with the contents of this paper, Mr. Buck?

WITNESS: Thoroughly, sir; yes, sir.

Judge WAITE: What do you say as to the correctness of those parts of it which are assumed to be transcripts from the history of this branch of the art?

WITNESS: It is taken from the authorities.

Judge WAITE: It is correct, is it?

WITNESS: Yes, sir.

Mr. LANE: So far as it assumes to state historical facts, Mr. Buck, is it correct throughout?

WITNESS: I think so.

Mr. LANE: Is it based upon your studies and researches?

WITNESS: Yes, sir.

Judge WAITE: What books have you quoted from?

WITNESS: Digby Wyatt's "Metal Work" and "History of Sculpture" by Lubke.

Judge WAITE: So far as it treats with the history of this branch of the art it will be admitted.

The report is marked in evidence Exhibit 8, 267,838, May 8, 1908.

Mr. LANE: As an aid to the memory and information of the court I submit an excerpt from the New International Encyclopedia under the caption of "Sculpture."

Same objections; same ruling.

The paper is marked in evidence Exhibit 9, 267,838, May 8, 1908.

80 Q. Mr. Buck, will you please read the excerpt from the International Encyclopedia marked Exhibit 9 in this case, and state if the description there given accords with your

knowledge, researches and experience on the subject of wrought metal work?

A. Yes, sir.

Q. Mr. Buck, please look at the photographs which I now hand you and state if you have seen the original of those photographs?

A. Yes, sir.

Q. Have you examined it closely?

A. Yes, sir, I made a full examination.

Q. What is that?

A. It is a biga chariot.

Q. Is it an example of repoussé work in metal?

A. A very good one, yes, sir, of bronze plates.

Q. Are all those plates hammered out by hand?

A. Yes, sir, individually.

Q. Can you state that from an inspection of the plates themselves?

A. Yes, sir.

The photographs are offered in evidence as illustrations of repoussé work.

Judge WAITE:

Q. Can you say about when that was made?

A. About 500 B. C., sir.

Mr. SMITH: I submit, it is a pretty far cry from 1908 to 500 B. C. I object to any testimony on it on the ground that what may or may not have been done in the way of repoussé metal work in the year 500 B. C. can have no possible relevancy or materiality in determining the construction of a law passed in 1897 A. D., and the testimony is wholly irrelevant and immaterial.

Judge WAITE: I will admit it as illustrative of the history of the art.

81 The three photographs referred to are marked respectively Exhibit- 10, 11 and 12, 267,838, May 8/08.

By Mr. LANE:

Q. Mr. Buck, please look at these photographs marked Exhibit- 10, 11, and 12 and state if the Exhibits 11 and 12 represent the details of the panels of Exhibit 10?

A. Exhibit 10 is a side view of the chariot, Exhibit 11 is the front panel of the chariot, and Exhibit 12 represents the side panels of the chariot.

By Mr. SMITH:

Q. Referring to the Exhibit 6, Mr. Buck, you made some statement on your direct examination about having had those articles in your hand in Philadelphia, is that right?

A. Quite right.

Q. You mean both of them?

A. Both of them.

Q. Now you stated an opinion as to how those articles were made.

Did you ever see or actually witness with your own eyes the making of articles similar to those on the Exhibit 6, or any other articles in the way you have described on your direct testimony?

A. Not in iron.

Q. Did you ever see it done in any metal?

A. Silver.

Q. Where?

A. At the Gorham factory.

Q. What were the articles?

A. Principally they would be the centre of an alms basin or something of that sort.

Q. Such things as that were made at the Gorham foundry?

A. In the ordinary way of chasing and repoussé.

Q. What is it about these figures here, the originals of the Exhibit 6, which leads you to the opinion they were made in the way you have described?

A. Simply that would be the only practical way of making them.

Q. The articles, as I understand it, were made in Japan?

82 A. I don't know where they were made.

Q. Were you ever in Japan?

A. Never.

Q. Ever interest yourself particularly in Japanese arts and industries?

A. Never; very little.

Q. When you state these articles were made in the way you have described, and that your opinion is based upon the fact that that is the only practical way of making them, you mean that that is the only practical way of making them that you have seen or have known of in this country?

A. And parts of Europe, yes, sir.

Q. What is the size of these articles represented in the Exhibit 6?

A. If I remember, they are under a foot high.

Q. Have you stated in your previous answers all the articles that you have seen here or elsewhere made in the way you have said in your opinion these articles were made?

A. I could not.

Q. Why not?

A. Why, it would take a good deal of time and a good deal of work to get up such a statement. You mean repoussé figure work?

Q. You stated that you made or had made or saw made in the Gorham foundry certain alms basins that were made of silver in the way you claim these articles on the Exhibit 6 were made?

A. Just by hammering, yes, sir.

Q. Can you name any other articles made of silver or anything else that you have seen, actually seen made either in Gorham's place or any place in Europe, that you claim were made the way these articles in Exhibit 6 were made?

A. Certainly.

Q. Give it.

83 A. I have been through the factory and have naturally seen these articles in the process of manufacture. A man

must go through the factory with his eyes shut if he could not see that.

Q. Name some.

A. Take vegetable dishes, take any ordinary domestic work for instance, tea pots, coffee pots, vegetable dishes, all being hammered out in the same way.

Q. And you have seen that?

A. Certainly.

Q. Made of what metal?

A. Silver.

Q. All silver?

A. Well, there would be some plated ware.

Q. And plated with silver?

A. Afterwards, yes, sir.

Mr. SMITH: I want to know, Mr. Lane, before we go any further—you said something about leaving out this first question (on Exhibit 8). Do I understand the first page of this report is not offered in evidence?

Mr. LANE: Yes, all of it from page 2 is in; page 1 is out. Page 1 may be eliminated.

Q. Referring now to Exhibit 8, Mr. Buck, page 2, I find a statement that "between 1300 and 1400 many sepulchral effigies were produced, principally at Limoges in France." What is your authority for that statement?

A. Almost any book on Limoges enamels, and if you refer to Wyatt's "Metal Work" I think you will find it in there.

Q. You mean this book you refer to, Digby Wyatt's "Metal Work and its Artistic Design"?

A. Yes, sir.

Q. Sure you will find it in there?

A. Yes, I think you will find it there, and you will find it in almost any work. It is a well known work.

Q. Now on page 4 of this document I find this: "A noted example of statuary wrought by hand from the solid metal is that of Charles II referred to above. This figure is wrought by hand from a solid piece of iron nine inches high and weighing 14 pounds, by
84 the Sculptor Leigeber, in 1667, and is now in the Cabinet of Bronzes, Green Vaults, Dresden, Saxony". Where did you get the authority for that statement?

A. From the catalogue of that collection; that is a well known example.

By Mr. LANE:

Q. Mr. Buck, have you in the course of your business and professional experience examined few or many examples of repoussé work?

A. Of course, naturally, I have examined a great many.

Q. Is it part of your duties to examine a great many examples of work of this kind?

A. That is all in my department which includes all metal work except arms and armor.

Q. Have you in the course of your examination of such examples acquired the ability to distinguish between wrought and cast work from an examination?

A. Surely.

Q. So when you enumerated certain articles you had seen made in response to my opponent's question, you didn't mean to intimate that that was the extent of your familiarity with repoussé work?

A. Hardly.

Q. Does the Metropolitan Museum keep catalogues of most of the museums on file?

A. Yes, sir.

Q. Are they recognized among artists and others interested as author-ative descriptions of the works to which they refer?

A. Most assuredly.

Q. Are they compiled with care by experts?

A. Yes, sir.

Q. Is the only information which you have ever received on the subject of this statue of Charles II derived from the catalogue of the Cabinet of Bronzes at Green Vaults, Dresden?

85 A. Oh, no. It is quoted in about every work on statuary.

Q. Is it a historical fact that it is a well known example of wrought work?

A. It is the best known example, I think, in Europe; the best known example.

Q. Do artists and professional men generally accept the fact that that is wrought without question?

A. Yes, sir.

Mr. SMITH: I object. How does this witness know what artists and professional men know generally.

Judge WAITE: I don't think that he can tell unless they told him.

Mr. LANE: The Government offers in evidence an affidavit of Mr. Edward A. Barber, director of the Pennsylvania Museum, as corroborative of the testimony of Mr. Buck with reference to the Exhibit 6.

Objected to; objection sustained.

Q. Can you tell from such examination as you made of the figure of the ape represented by the Exhibit 6 in the Pennsylvania Museum whether that is a modern work?

A. I think so, yes, from the state of the patina and the state of the metal itself.

By Mr. SMITH:

Q. How old so you think?

A. Within the last century; within 50 or a hundred years surely.

By Mr. LANE:

Q. That is as near as you can approach it?

A. Yes, sir. It all depends on where the thing has been kept.

Mr. LANE: As dealing with modern example of statuary wrought

by hand from metal the Government offers in evidence copies of the Scientific American under date of May 10, 1884, and October 23, 1886, containing contemporaneous accounts of the method of producing the statue of Liberty now in New York harbor.

86 These are offered not as evidence but for the assistance of the court in the same manner as the report of Mr. Buck.

No objection by counsel for the importers the same are marked in evidence respectively Exhibit 13 and Exhibit 14, 267,838, May 8, 1908.

Case closed.

87 *Opinion of Board of U. S. General Appraisers.*

G. A. 6813. (T. D. 29,279.)

United States General Appraisers, New York, Sep. 29, 1908.

In the Matter of Protest, 267,838, of B. ALTMAN & Co. Against the Assessment of Duty by the Collector of Customs at the Port of New York.

Before Board 3.

WAITE, *General Appraiser:*

The question here arises over the importation of a bronze bust of Louis XVI, No. 4221 on the invoice, valued at 800 francs, less 10 per cent and 2 per cent. It was assessed for duty at 45 per cent ad valorem under paragraph 193, tariff act of 1897, which reads as follows:

193. Articles or wares not specially provided for in this Act, composed wholly or in part of iron, steel, lead, copper, nickel, pewter, zinc, gold, silver, platinum, aluminum or other metal, and whether partly or wholly manufactured, forty-five per centum ad valorem.

The importers claim it is dutiable at 15 per cent ad valorem under the provisions of section 3 and the reciprocal commercial agreement with France (T. D. 19405), which agreement is authorized by said Section 3, and provides, among other things, for the importation of paintings and statuary at the rate of 15 per cent ad valorem. In order to have a full understanding of the issue here involved, it becomes necessary to consider said Section 3 and the French Treaty in connection with paragraph 454 of the act, which reads as follows:

454. Paintings in oil or water colors, pastels, pen and ink drawings, and statuary, not specially provided for in this Act, twenty per centum ad valorem; but the term "statuary" as used in this Act shall be understood to include only such statuary as is cut, carved, or otherwise wrought by hand from a solid block or mass of marble, stone or alabaster, or from metal, and as is the professional production of a statuary or sculptor only.

It is claimed that the collector erred in assuming that the
88 word "statuary" as used in Section 3 and said commercial agreement is subject to the provision in said paragraph 454

as to what shall be considered statuary; to wit: " 'statuary' as used in this Act shall be understood to include only such statuary as is cut, carved, or otherwise wrought by hand from * * * metal, and as is the professional production of a statuary or sculptor only".

If such definition is applicable, then it is further contended by the importers that this statue is nevertheless "wrought by hand * * * from metal" and is the professional production of a statuary or sculptor within the meaning of said paragraph 454.

As to the question whether the term "statuary" in section 3 and the French reciprocity agreement is subject to the definition found in paragraph 454, we say: This question has been passed upon by the circuit court of appeals in the second circuit in the case of Richard v. United States, (158 Fed. Rep. 1019; T. D. 28601), affirming the decision of the circuit court in 151 Fed. Rep., 954 (T. D. 27948), and by the Board in Havemeyer's case, G. A. 5286 (T. D. 24247). These decisions specifically denied the contention of the importers in this case. We therefore overrule the protest on this claim.

There then remains the question as to whether the piece of statuary here involved was wrought by hand "from metal" and was the "professional production of a statuary or sculptor only". Considerable testimony has been taken, but none of it shows any unusual method in the production of this bust. The bust itself was not in evidence; neither was any one brought before us who had seen its production. For the purposes of this case, it must be considered as a piece of ordinary bronze statuary, sometimes termed "commercial statuary", produced by casting from a model made in some plastic material under the hand of the artist This
89 kind of statuary has been the subject of decisions both by the Board and the courts in various cases. The importers in their contention rely on the case of United States v. Tiffany (160 Fed. Rep. 408; T. D. 28717), as modifying all previous decisions on this subject. Paragraph 454 of the act of 1897 is the same as paragraph 465 of the act of 1890, under which last-named act the circuit court of appeals for the second circuit passed upon cast bronze statuary in the case of Tiffany v. United States (71 Fed. Rep. 691.) We are of the opinion that this decision should govern in the case at bar, and that the case of United States v. Tiffany (supra) is distinguished. In the case of Tiffany v. United States (supra), the court used the following language:

The artist's hand-work in preparing the clay model is in no sense the work which transforms the metal itself into the statue, and the fact that some "touching up or smoothing or chasing is put upon the casting after it comes from the mold is not sufficient to entitle it to classification as statuary wrought by hand from metal, especially in view of the testimony of appellant's witness that there are bronze statues made from metal not by casting, but by beating. The amendment was inserted to accomplish a purpose, and its language is so plain and unambiguous that a construction which would eliminate it cannot be adopted. It manifestly excludes from the provisions of paragraph 465 (Act of 1890) all metal statuary which is not wrought

by hand from the metal, and statuary which is substantially made by casting is not so wrought, although it may be afterwards surface-finished by workman or artist.

The case (U. S. v. Taffany, 160 Fed. Rep., 408; T. D. 28717, supra) relied upon by protestants is distinguished from the last above-mentioned case by the court in this language:

After the various parts had been cast, the important work, that which gives it its distinctive personal character, was done by hand, the sculptor carefully going over the figure and making the alterations and changes necessary to embody his ideas. It is this artistic feature, this expression to the sculptor's intentions, which gives value to the statue, not the price paid for the bronze and ivory. No one but a sculptor of the highest merit could have cut the ivory face, so symbolic of the horrors of war, or fashioned the cloak which is considered one of the most wonderful pieces of bronze in existence. In short, the statue was the work of Gerome, and to its minutest details he gave the best work of his brain and hand.

90 Further distinguishing the two cases, the court says:

It appeared in that case (Tiffany v. United States, 71 Fed. Rep., 691) that the Government's contention was that the importations were known as "commercial bronzes," some of them being reproduced many times and none of them receiving more than perfunctory attention from the original sculptor. There was also evidence that there were bronze statues made not by casting, but by hand "beating." In the present case there is no such testimony, and, as we have before seen, the entire work, from the original conception until the last touch was placed upon the statue, was under the direct and constant supervision of Gerome.

In the case at bar there is much testimony which clearly shows, we think, that repoussé work, or work produced by hammering and entirely wrought by hand, has been known from a remote time, specimens of which are cited, showing that they have been produced even down to the present, to-wit, the Japanese figure of an ape (Exhibit 6), the statue of St. Sebastian (Exhibit 7), the figure of Charles II (Exhibit 8), the Greek chariot (Exhibits 10, 11 and 12), and the Statue of Liberty (Exhibits 13 and 14). We do not think it is shown that this method of producing bronze or metal statues by hand has been very extensively used; still we are of the opinion, in view of the ease with which commercial bronze statuary may be produced by the hand of a skilled artisan entirely independent of the artist, that it was intended to prohibit the importation under said paragraph 454 of such pieces of casting, thereby protecting the bronze foundries and the domestic industries, where great quantities of labor are employed and large capital is invested.

In the absence of testimony to the contrary, we assume that this piece of statuary was produced in the ordinary way, and that practically all the *hand* work upon it was done by the artisan at the foundry, which hand work consists of removing seams and protuberances left by the imperfections of the mold, and perhaps chasing or smoothing the surface of the figure, which in no way change

91 the form after it is taken from the matrix or mold. In fact, the efficiency of the foundry is determined by the degree of

resemblance that the metal statue bears to the model, and should the statue vary to any extent, it would be rejected as an imperfect casting. From the testimony in this case, it does not appear to us that an artist whose business it is to work upon plastic material would feel competent to change the figure, facial expression or dimensions after the metal casting had been made. The testimony of founders and workmen who have been in the business for years satisfies us that, in this class of statuary, the artist has very little, if anything, to do with the statue after he has produced the model. We therefore hold that the piece of statuary involved herein is not "wrought by hand * * * from metal."

In view of this conclusion, it becomes unnecessary to discuss the only remaining question: to-wit, whether this bust is the professional production of a statuary or sculptor.

The protest is overruled and the decision of the Collector will stand.

BYRON S. WAITE,
H. M. SOMERVILLE,
EUGENE G. HAY,
Board of U. S. General Appraisers.

(No. 5372—United States Circuit Court, Southern District of New York. B. Altman & Co. v. United States. Return of record by Board of United States General Appraisers. U. S. Circuit Court, Southern District N. Y. Filed Nov. 27, 1908. John A. Shields, Clerk.)

92 EXHIBIT 1.

(Card.)

Jno. Williams, President; Jos. Mitchell, V. Prest. & Genl. Mgr.; Wm. Donald Mitchell, Secy. & Treas.

Wrought Iron Dept. H. B. Stillman, Manager.

Jno. Williams, Inc.

Special Metal Work in Bronze, Brass and Wrought Iron.

Architectural: Decorative: Monumental: Designs and Estimates Furnished.

Bronze Foundry and Works. Wrought Iron Works, 544 to 566 West 27th Street.

Office: 556 West 27th Street.

Protest 267,838.

New York, Feb. 12, 1908.

93 EXHIBIT 8. 267,838. May 8, 1908.

Metropolitan Museum of Art,

New York.

Department of Metal Work.

Cable address: Metmusart.

MARCH 21, 1908.

Mr. T. M. Lane, New York City.

DEAR SIR: I have your favor of the 18th of March, in which you state that the present tariff act contains a provision for statuary wrought by hand from metal, and in which you ask two questions with regard to this provision.

(1) "Can the provision quoted be applied to cast bronze statuary?" To this I would answer—as the work of producing bronze statues is done at present—No. In the olden times, say those of Cellini, the model, casting, and finishing were from one hand—that of the artist. This might possibly come under the head of statuary wrought by hand from metal. There are also examples to be found in various museums of small statues (statu-ttes) wrought by hand from the solid metal—a noted example being that of Charles II (now in the Cabinet of Bronzes, Green vaults, Dresden, Saxony) which is wrought by hand from a solid piece of iron, 9 inches high and weighing 14 pounds, by the sculptor, Leigeber in 1667.

(2) "Is there a class of metal statuary extant which answers the description of statuary wrought by hand from metal?"

Lubke in his History of Sculpture gives a careful description of the various processes used from the earliest ages to the present time: "In the Homeric period this working of metals was nothing but the art of fashioning thin metal plates, which the Greeks desig-
94 nated *empæstics*. Metal casting is nowhere mentioned; it was a much later invention." Enormous figures were constructed with plates of metal, ivory, etc., built on a framework of wood supported by inserted iron stays, as the statue of Athena Parthenos by the sculptor Phidias.

Coming to mediæval times, we have the "beaten work" of numerous artists still preserved, these consisting principally of statuettes or small figures for the decoration of altars, etc. Between 1300 and 1400 many sepulchural effigies were produced, principally at Limoges in France. There were not cast, but were made of hammered (repoussé) plates of copper, nailed on a wooden core and richly decorated with champleve enamels in various bright colours. Westminster Abbey possesses a fine example, executed about 1300, in the effigy of William of Valence. And there is now in the mediæval room of the Louvre an effigy of similar workmanship and age, but without any enamels remaining on it. This is the statue of Blanche of Champagne (d. 1283), also executed at Limoges. The thin bronze sheeting over the wood model is applied in many pieces.

Digby Wyatt, in his "Metal Work and Its Artistic Design," 1852,

London, refers frequently to wrought work described in Theophilus' "Arts of the Middle Ages" (XI Century), and to Cellini's "I Trattati dell' Oreficeriæ delia Scultura." The following extract from the latter shows the method of making statuettes beaten out of the precious metals.

"In treating of the two usual methods of working with chisel, one of them being less easy of execution than the other, we will
95 first describe that followed by Caradosso (Foppa), which was the most difficult of the two.

"That worthy artificer made, in the first place, a most careful model in wax of his subject, and filling up with clay the undercuttings, cast it in bronze; he then took a plate of gold, the thickness of which increased towards the center, not so much, however, that he could not easily bend it, its width being also greater than that of his model. Having heated and worked the plate to a raised form, he placed it on the bronze model, and then hammered it with tools or punches made of birch or wild cherry, gradually causing the plate to take the forms of the figures on the model; taking care, however, that the gold should not break, using his tools, whether of iron or wood, with great dexterity on either side of the plate, and always striving to render the gold of an equal thickness throughout. The carefulness of Caradosso in this was very great.

"When he had brought the medallion (figure) to the height of relief he desired, he commenced the forcing of the metal between the legs and arms and behind the heads of the figures; giving to this much attention: and having brought the parts so well together that their edges joined, he cut away the grounds which remained under the legs, arms and other parts of these figures, as he also did to all the remaining parts which were detached from the field.

"The work being brought to this point, he commenced the joining of it by the method called soldering by fusion or heat.

"Of the talents of Caradosso, Cellini speaks in terms of the highest admiration. As an enameller, he is honourably mentioned; but as an executant of figures in the round, beaten up out of
96 sheets of gold or silver, and so soldered in the seams that no marks whatever could be seen, he placed him first of all."

The enclosed photograph of Saint Sebastian is that of a statuette, 7½ inches high, 11¾ inches including base, wrought in silver, parcel gilt, made in the manner described in the preceding paragraph, the soldered joints barely showing.

A noted example of statuary wrought by hand from the solid metal is that of Charles II, referred to above. This figure is wrought by hand from a solid piece of iron nine inches high and weighing 14 pounds, by the Sculptor Leigeber, in 1667, and is now in the Cabinet of Bronzes, Green Vaults, Dresden, Saxony. A cut of this figure is shown below.

I am of the opinion that in early times the statuary was frequently made of metal plates fastened to skeleton framework, but of recent years, with very few exceptions—and one that of the Statue of Liberty—I think it will be found that this mode of working in statuary was confined principally to small statuettes for the decoration of

altars, pulpits, etc, in places where lightness of material was required.

Respectfully yours,

JOHN H. BUCK,
Curator.

(Picture of Charles II iron Statuette.)

Stamp of Metropolitan Museum of Art, Department of Metal Work, New York.

97 EXHIBIT 9. 267,838. May 8, 1908.

Metal may also be used in a quasi-plastic way, for the great tenacity of copper and the somewhat less but still available toughness and expansibility of bronze, together with the perfect ease with which the precious metals can be manipulated in this way, have always induced the artist to work in thin plates, embossing them by hammering from the 'wrong' side and then chasing and perhaps engraving the face so as to modify the original embossing. (See Repoussé.) This is done on a very large scale in the case of colossal bronze statues, which are commonly made of plates of bronze hammered into reliefs and depressions and afterwards bolted together, and also in producing small decorative vessels.

The New International Encyclopædia, Vol. XVII. (Sculpture), Page 719.

98 *Petition and Order for Further Evidence.*

United States Circuit Court, Southern District of New York.

No. 5372.

In the Matter of the Application of B. ALTMAN & Co. for a Review of the Decision of the General Appraisers as to the Rates, &c., of Duties on Certain Mdse. Imported by Them per S. S. La Provence Sept. 1/06.

To the Honorable the Circuit Court of the United States for the Southern District of New York:

Your petitioners B. Altman & Co., respectfully represent:

First. That a return from the Board of United States General Appraisers in the above entitled matter was filed in the office of the Clerk of this Court on the 25th day of November 1908.

Second. That your petitioners desire to present further evidence in the above entitled matter.

Wherefore. Your petitioners pray that an order be made referring said matter to one of the General Appraisers to take and return to said Court such further evidence as may be offered.

Dated Dec. 15th, 1908.

B. ALTMAN & CO., *Petitioners.*
By CURIE, SMITH & MAXWELL, *Att'ys.*

Upon reading and filing the foregoing petition of B. Altman & Co., and on motion of Curie, Smith & Maxwell, attorneys for said petitioners,

It is ordered, That the above entitled matter be and the same hereby is referred to General Appraiser Marion De Vries, to take and return to this Court such further evidence as may be offered in said matter.

Dated, Dec. 15th, 1908.

E. H. LACOMBE,
U. S. Circuit Judge.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Dec. 15, 1908. John A. Shields, Clerk.

99 At a Stated Term of the Circuit Court of the United States of America for the Southern District of New York, Held at the United States Circuit Court Rooms in the Post Office Building, in the City of New York, on the 4th Day of June, 1909.

Present: The Hon. James P. Platt, U. S. Judge.

No. 5372.

B. ALTMAN & COMPANY
vs.
THE UNITED STATES.

The above cause coming on for hearing and determination before this Court on the application of B. Altman & Company, for a review of the questions of law and fact involved in the decisions of the Board of U. S. General Appraisers herein, and on the return of the Board of General Appraisers of the record and evidence taken by them with their certified statement of the facts involved therein, together with their decision thereon;

Now, after hearing W. Wickham Smith, Esq., Counsel for petitioner in favor of the reversal of said decision of the Board of General Appraisers and D. Frank Lloyd Esq., Assistant United States Attorney in favor of affirmance.

On motion of Henry A. Wise, Esq., Assistant U. S. Attorney,

It is ordered, adjudged and decreed that there was no error in the decision of said Board of General Appraisers and that said decision be in all things affirmed on the authority of Tiffany vs. United States, 71 F. R. 691, and Richards vs. United States, 151 F. R. 954.

JAMES P. PLATT,
U. S. Judge.

100 Consented to as to form.
HENRY A WISE,
Per LLOYD, *United States Attorney.*
CURIE, SMITH & MAXWELL,
Attorneys for Importers.

(Endorsed:) U. S. Circuit Court, Southern District of New York. B. Altman & Company vs. The United States. Judgment of Affirmance. United States Attorney, Attorney for U. S. United States Circuit Court, Southern District N. Y. Filed Jun. 7, 1909. John A. Shields, Clerk.

101 United States Circuit Court, Southern District of New York.

B. ALTMAN & COMPANY
vs.
UNITED STATES.

It is hereby stipulated by the attorneys for the respective parties hereto that the exhibits numbered respectively

2.....Catalogue
3.....Photo
4.....Photo
5.....Cut of Statue
6.....Photo
7.....Photo
10.....Photo
11.....Photo
12.....Photo
13.....Copy of Scientific American
14.....Copy of Scientific American

may be withdrawn from the files of the Circuit Court of the Southern District of New York and sent to the Clerk of the Supreme Court of the United States.

Dated New York, Oct. 28th, 1909.

CURIE, SMITH & MAXWELL,
Attorneys for Importer-.
D. FRANK LLOYD,
Attorney for U. S. Dep. Asst. Att'y Gen'l.

Ordered accordingly.
E. H. LACOMBE,
U. S. Circuit Judge.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Oct. 28, 1909. John A. Shields, Clerk.

102 United States Circuit Court, Southern District of New York.

No. 5372.

B. ALTMAN & CO.
vs.
THE UNITED STATES.

The above named importers, B. Altman & Co., conceiving themselves aggrieved by the decision entered herein on the 7th day of

June, 1909, affirming the decision of the Board of United States General Appraisers, do hereby appeal from the said decision to the Supreme Court of the United States and they pray that this appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said decision was made, duly authenticated may be sent to the Supreme Court of the United States.

Dated, New York, July 2nd, 1909.

B. ALTMAN & CO.,
By CURIE, SMITH & MAXWELL,
Attorneys for Appellants,
32 Broadway, New York City.

It is hereby certified that the questions involved in this case
103 and described in the annexed appeal are, in the opinion of this Court of such importance, as to require a review of the decision of this Court by the Supreme Court of the United States and the appeal from said decision to said Supreme Court of the United States is therefore allowed.

Dated, New York, July 2nd, 1909.

E. H. LACOMBE,
U. S. Circuit Judge.

(Endorsed:) No. 5372. United States Circuit Court, Southern District of New York. B. Altman & Co., vs. The United States. Petition and Allowance of Appeal. Curie, Smith & Maxwell, Attorneys for Appellants, 32 Broadway, New York City. A copy of the within paper has been this day received at this office, Jul. 7, 1909. Henry A. Wise, U. S. Attorney. U. S. Circuit Court, Southern District N. Y. Filed Jul. 7, 1909. John A. Shields, Clerk.

104 **Supreme Court of the United States.**

B. ALTMAN & Co., Appellants,
against
THE UNITED STATES, Defendants.

And now come B. Altman & Co., the above-named appellants, before this court and hereby assign as errors to the decision and judgment of the Circuit Court for the Southern District of New York, as follows:

1. In not holding that the commercial agreement between the United States and France, as proclaimed by the President of the United States (T. D. 19405), was to be in full scope according to its language without being in any way restricted or modified by the definition contained in paragraph 454, section 1 of the Tariff Act of July 24, 1897, but which definition was not embodied either in the commercial agreement itself or in the President's proclamation thereof.

2. In not holding that the term "statuary" as used in section 3 of the Tariff Act and in said commercial agreement with France or the

President's proclamation thereof, was not subject to the definition contained in paragraph 454, Schedule N, Section 1 of said Tariff Act.

3. In not holding the merchandise dutiable at 15% *ad valo-*
105 rem under section 3 of the Tariff Act and the commercial agreement with France and the President's proclamation thereof.

4. In holding that statuary which is substantially made by casting is not wrought from metal, though it may be afterwards surface-finished by the artist.

5. In not holding that the article in question was an article wrought from metal, the production of a professional statuary or sculptor and a piece of statuary.

6. In not holding the merchandise dutiable at 20% under paragraph 454, Schedule N of the Tariff Act of July 24, 1897.

7. In holding the merchandise dutiable at 45% under paragraph 193 as manufactured metal.

8. In affirming the decision of the Board of General Appraisers.

9. In not reversing the decision of the Board of General Appraisers and of the Collector of the Port and holding the merchandise dutiable at either 15% under section 3 and the Commercial Agreement with France as proclaimed by the President, or at 20% under paragraph 454, Schedule N of the Tariff Act.

CURIE, SMITH & MAXWELL,
Attorneys for Appellants,
32 Broadway, New York City.

(Endorsed:) Supreme Court of the United States. B. Altman & Co. Appellant-, against The United States, Defendant. Assignment of Errors. Curie, Smith & Maxwell, Attorneys for Appellants, 32 Broadway, New York City. U. S. Circuit Court, Southern District, N. Y. Filed Jul- 2, 1909. John A. Shields, Clerk.

106 Know all men by these Presents, That I, Henry B. J. Craig am held and firmly bound unto the United States of America in the sum of Two Hundred and Fifty Dollars, to be paid to the said United States of America, for the payment of which, well and truly to be made, I bind myself, my heirs, executors and administrators, firmly by these presents.

Sealed with my seal and dated the 2nd day of July in the year of our Lord one thousand nine hundred and nine.

Whereas, B. Altman & Company have prosecuted an appeal to the Supreme Court of the United States to reverse the judgment rendered herein by the Judge of Circuit Court for the Southern District of New York.

Now, Therefore, the conditions of this obligation are such that if the above named B. Altman & Company shall prosecute said appeal to effect and answer all damages and costs, if they fail to make said appeal good, then this obligation shall be void, otherwise the same remain in full force and virtue.

HENRY B. J. CRAIG. [SEAL.]

Sealed and delivered and taken and acknowledged this 2nd day of July before me,

[SEAL.]

ELY NEUMANN,
Notary Public, N. Y. County.

Henry B. J. Craig being duly sworn, deposes and says: That he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

HENRY B. J. CRAIG.

Sworn to before me this 2nd day of July 1909.

ELY MEUMANN,
Notary Public, N. Y. County.

107 The foregoing bond is approved as to form, amount and sufficiency of surety.

E. H. LACOMBE,
U. S. Circuit Judge.

(Endorsed:) United States Circuit Court, Southern District of New York. B. Altman & Co., Appellant-, vs. The United States, Defendant. Bond for damages and costs. Curie, Smith & Maxwell, Attorneys for Appellant, 32 Broadway, New York City. U. S. Circuit Court, Southern District, N. Y. Filed Jul- 7, 1909. John A. Shields, Clerk.

108 UNITED STATES OF AMERICA, *ss:*

To the United States of America, Greetings:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States at the City of Washington on the 30 day of July 1909, pursuant to an appeal and writ of error on the part of B. Altman & Company filed in the office of the Clerk of the Circuit Court of the United States for the Southern District of New York, in a certain suit entitled B. Altman & Company vs. United States No. 5372, to show cause if any there be, why the decision of the United States Circuit Court of the Southern District of New York, in the said appeal mentioned, should not be reversed, modified or corrected, and speedy justice should not be done in that behalf.

Given under my hand, at the City of New York, in the Southern District of New York, on the 2nd day of July 1909.

E. H. LACOMBE,
Judge of the U. S. Circuit Court,
Southern District of New York.

109 [Endorsed:] 2. E. & A. C. 2945. Supreme Court of the United States B. Altman & Co., Appellant-, against The United States, Defendant. (Original) Citation. Curie, Smith & Maxwell, Attorneys for Appellants, 32 Broadway, New York City. A copy of the within paper has been this day received at this office,

Jul- 7, 1909. Henry A. Wise, U. S. Attorney. M. U. S. Circuit Court, Southern District, N. Y. Filed Jul- 7, 1909. John A. Shields, Clerk.

[Endorsed:] Supreme Court of the United States. B. Altman & Company, Plaintiff- in Error, vs. The United States, Defendant in Error. Return to writ of error.

Endorsed on cover: File No. 22,018. S. New York C. C. U. S. Term No. 792. B. Altman & Co., plaintiffs in error, vs. The United States. Filed February 15th, 1910. File No. 22,018.

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SUPREME COURT OF THE UNITED STATES

B. ALTMAN & CO.,
Appellants

vs.

THE UNITED STATES,
Appellee.

October Term, 1909
No. 792.

BRIEF FOR APPELLANTS.

Statement.

The appellants imported into New York from France in 1906 certain bronze statuary, to wit, a bronze bust of Louis XVI. Other pending cases, awaiting the final determination of this case, involve a considerable number of shipments. At that time the following provisions of law were in effect: Tariff Act of July 24, 1897:

Sec. 1, par. 193, in Schedule C, entitled "Metal and Manufactures of":

> "Articles or wares not specially provided for in this Act, composed wholly or in part of iron, steel, lead, copper, nickel, pewter, zinc, gold, silver, platinum, aluminum or other met-

al, and whether partly or wholly manufactured, forty-five per centum ad valorem" (30 Stat. at L. 167).

Sec. 1, par. 454, in Schedule N, entitled "Sundries":

"Paintings in oil or water colors, pastels, pen and ink drawings, and statuary, not specially provided for in this Act, twenty per centum ad valorem; but the term 'statuary,' as used in this Act shall be understood to include only such statuary as is cut, carved, or otherwise wrought by hand from a solid block or mass of marble, stone, or alabaster, or from metal, and as is the professional production of a statuary or sculptor only" (30 Stat. at L. 194).

Sec. 3:

"That for the purpose of equalizing the trade of the United States with foreign countries, and their colonies, producing and exporting to this country the following articles: Argols, or crude tartar, or wine lees, crude; brandies, or other spirits manufactured or distilled from grain or other materials; champagne and all other sparkling wines; still wines, and vermuth; paintings and statuary; or any of them, the President be, and he is hereby, authorized, as soon as may be after the passage of this Act, and from time to time thereafter, to enter into negotiations with the governments of those countries exporting to the United States the above-mentioned articles, or any of them, with a view to the arrangement of commercial agreements in which reciprocal and equivalent concessions may be secured in favor of the products and manufactures of the United States; and whenever the government of any country, or colony, producing and exporting

to the United States the above-mentioned articles, or any of them, shall enter into a commercial agreement with the United States, or make concessions in favor of the products, or manufactures thereof, which, in the judgment of the President, shall be reciprocal and equivalent, he shall be and he is hereby, authorized and empowered to suspend, during the time of such agreement or concession, by proclamation to that effect, the imposition and collection of the duties mentioned in this Act, on such article or articles so exported to the United States from such country or colony, and thereupon and thereafter the duties levied, collected and paid upon such article or articles shall be as follows, namely:

Argols, or crude tartar, or wine lees, crude, five per centum ad valorem.

Brandies or other spirits manufactured or distilled from grain or other materials, one dollar and seventy-five cents per proof gallon.

Champagne and all other sparkling wines, in bottles containing not more than one quart and more than one pint, six dollars per dozen; containing not more than one pint each and more than one-half pint, three dollars per dozen; containing one-half pint each or less, one dollar and fifty cents per dozen; in bottles or other vessels containing more than one quart each, in addition to six dollars per dozen bottles on the quantities in excess of one quart, at the rate of one dollar and ninety cents per gallon.

Still wines, and vermuth, in casks, thirty-five cents per gallon; in bottles or jugs, per case of one dozen bottles or jugs containing each not more than one quart and more than one pint, or twenty-four bottles or jugs containing each not more than one pint, one dollar and twenty-five cents per case, and any excess beyond these quantities found in such bottles or jugs shall be subject to a duty of

four cents per pint or fractional part thereof, but no separate or additional duty shall be assessed upon the bottles or jugs.

Paintings in oil or water colors, pastels, pen and ink drawings, and statuary, fifteen per centum ad valorem.

The President shall have power, and it shall be his duty, whenever he shall be satisfied that any such agreement in this Section mentioned is not being fully executed by the government with which it shall have been made, to revoke such suspension and notify such government thereof.

And it is futher provided that, with a view to secure reciprocal trade with countries producing the following articles, whenever and so often as the President shall be satisfied that the government of any country, or colony of such government, producing and exporting directly or indirectly to the United States coffee, tea, and tonquin, tonqua, or tonka beans, and vanilla beans, or any such articles, imposes duties or other exactions upon the agricultural, manufactured, or other products of the United States, which, in view of the introduction of such coffee, tea, and tonquin, tonqua, or tonka beans, and vanilla beans, into the United States, as in this Act hereinbefore provided for, he may deem to be reciprocally unequal and unreasonable, he shall have the power and it shall be his duty to suspend, by proclamation to that effect, the provisions of this Act relating to the free introduction of such coffee, tea, and tonquin, tonqua, or tonka beans, and vanilla beans, of the products of such country or colony, for such time as he shall deem just; and in such case and during such suspension, duties shall be levied, collected, and paid upon coffee, tea, and tonquin, tonqua, or tonka beans, and vanilla beans, the products or exports, direct or indirect, from such designated country, as follows:

On coffee, three cents per pound.
On tea, ten cents per pound.
On tonquin, tonqua, or tonka beans, fifty cents per pound; vanilla beans, two dollars per pound; vanilla beans, commercially known as cuts, one dollar per pound" (30 Stat. at L. 203).

Treaty or agreement with France, made pursuant to foregoing Section 3, as follows (copy certified by Secretary of State filed with Clerk of this Court):

No. 9185

UNITED STATES OF AMERICA.

DEPARTMENT OF STATE.

TO ALL TO WHOM THESE PRESENTS SHALL COME,

GREETING:

I CERTIFY that the document hereunto annexed is a true copy from the original in the archives of this department (Reciprocal commercial agreement between the United States and France; signed, May 28, 1898).

IN TESTIMONY WHEREOF, I, P. C. Knox, Secretary of State, have hereunto caused the seal of the Department of State to be affixed and my name subscribed by the Chief Clerk of the said department, at the City of Washington, this 4th day of April, 1912.

(Seal)

P. C. KNOX,
Secretary of State.
By WM. MCNEIR,
Chief Clerk.

Reciprocal commercial agreement concluded between the United States and France, May 28, 1898, to go into effect June 1, 1898.

(Seal) (Seal)

PROTOCOL

of the Reciprocal Agreement between the Governments of the United States of America and of the French Republic concluded at Washington this twenty-eighth day of May, 1898, by their respective Representatives duly empowered for that purpose; namely, on the part of the United States the Honorable John A. Kasson, Special Commissioner Plenipotentiary, etc., and on the part of the French Republic, His Excellency, M. Jules Cambon, Ambassador of France, etc., etc., etc.

The Government of the United States and the Government of France being animated by the same spirit of conciliation and being equally desirous to improve their commercial relations, have concluded the following Agreement.

I.

It is agreed on the part of France that during the continuance in force of this Agreement the following articles of commerce, the product of the soil or industry of the United States, shall be admitted into France at the minimum rates of duty, to wit, not exceeding the following rates:

French Tariff No.		francs per 100 kilogs.
19.	Canned meats	15
84.	Table fruits, fresh:	
	Lemons, oranges, cedrats and their varieties not mentioned	5

French Tariff No.		francs per 100 kilogs.
	Mandarin oranges	10
	Common table grapes	8
	Apples and pears:	
	For the table	2
	For cider and perry	1.50
	Other fruits except hothouse grapes and fruits	3
85.	Fruits dried or pressed (excluding raisins):	
	Apples and pears:	
	For the table	10
	For cider and perry	4
	Prunes	10
	Other fruits	5
128.	Common woods, logs	0.65
	Sawed or squared timber 80 mm. or more in thickness	1
	Squared or sawed lumber exceeding 35 mm. and less than 80 mm. in thickness	1.25
	Wood sawed 35 mm. or less in thickness	1.75
129.	Paving blocks	1.75
130.	Staves	0.75
160	Hops	30
174. ter	Apples and pears crushed, or cut and dried	1.50
	Manufactured and prepared pork meats	50
	Lard and its compounds	25

II.

It is reciprocally agreed on the part of the United States in accordance with the provisions of Section

3 of the United States Tariff Act of 1897 that during the continuance in force of this Agreement the following articles of commerce, the product of the soil or industry of France, shall be admitted into the United States at rates of duty not exceeding the following, to wit:

On argols, or crude tartar, or wine lees, crude, five per centum ad valorem.

On brandies, or other spirits manufactured or distilled from grain or other materials, one dollar and seventy-five cents per proof gallon.

On paintings in oil or water colors, pastels, pen and ink drawings, and statuary, fifteen per centum ad valorem.

It is further agreed on the part of the United States that the rates of duty heretofore imposed and collected on still wines, the product of France, under the provisions of the United States Tariff Act of 1897 shall be conditionally suspended, and in place thereof shall be imposed and collected as follows, namely:

On still wines and vermuth, in casks, thirty-five cents per gallon; in bottles or jugs, per case of one dozen bottles or jugs containing each not more than one quart and more than one pint, or twenty-four bottles or jugs containing each not more than one pint, one dollar and twenty-five cents per case, and any excess beyond these quantities found in such bottles or jugs shall be subject to a duty of four cents per pint or fractional part thereof, but no separate or additional duty shall be assessed upon the bottles or jugs.

But it is expressly understood that this latter concession may be withdrawn in the discretion of the President of the United States whenever additional

duties beyond those now existing, and which may be deemed by him unjust to the commerce of the United States, shall be imposed by France on products of the United States.

III.

This Agreement shall take effect and be in force on and after the first day of June, 1898.

Signed in duplicate this twenty-eighth day of May, A. D., 1898, in the City of Washington.

JOHN A. KASSON
JULES CAMBON

PROTOCOLE

de l'arrangement réciproque conclu à Washington le vingt-huit Mai mil huit cent quatre-vingt dix-huit, entre le Gouvernement des Etats-Unis d'Amérique et le Gouvernement de la République Française, par leurs représentants respectifs, dument autorisés à cet effet, savoir: pour le Gouvernement des Etats-Unis d'Amérique, l'Honorable John A. Kasson, commissaire spécial plénipotentiaire & & et pour le Gouvernement de la République Française, son Excellence M. Jules Cambon, Ambassadeur de France, &, &, &.

Le Gouvernement des Etats-Unis d'Amérique et le Gouvernement de la République Française, animés d'un même esprit de conciliation et également désireux d'améliorer les relations commerciales des deux Pays sont convenus de ce qui suit:

I.

Il est convenu de la part de la France que, tant que le présent arrangement restera en viguer, les

articles énumérés ci-après, produits du sol ou de l'industrie des Etats-Unis, seront admis en France aux droits du tarif minimum, c'est à dire à des droits ne dépassant pas les suivants, s voir:

Numéros du tarif français.	Désignation des produits.	Droits à percevoir par 100 Kilos. Francs.
19.	Conserves de viandes en boites	15.00
84.	Fruits de table, frais:	
	Citrons, oranges, cédrats et leurs variétés non dénommées	5.00
	Mandarines et chinois	10.00
	raisins de table ordinaires	8.00
	Pommes et poires de table	2.00
	Pommes et poires à cidre et à poiré	1.50
	Autres, à l'exception des raisins et fruits forcés	3.00
85.	Fruits de table, secs ou tapés:	
	Pommes et poires de table	10.00
	Pommes et poires à cidre et à poiré.	4.00
	Pruneaux et prunes	10.00
	Autres, à l'exception des raisins secs..	5.00
128.	Bois Communs: Bois ronds, bruts, non équarris, &., &.....	0.65
	Bois équarris ou sciés de 80 millimétres d'épaisseur et au-dessus	1.00
	Bois équarris ou sciés d'une épaisseur inférieure à 80 millimétres et supérieure à 35 mm.	1.25
	Bois sciés à 35 millimétres d'épaisseur et au-dessous	1.75
129.	Pavés en bois débités en morceaux	1.75
130.	Merrains	0.75

160. Houblon 30.00
174 ter. Pommes et poires écrasées 1.50
7. bis. Charcuterie fabriquée 50.00
30. Saindoux 25.00
§2

II.

Il est réciproquement convenu de la part des Etats-Unis, conformément aux dispositions de la section 3 de la loi douanière des Etats-Unis de 1897 que, tant que le présent arrangement restera en vigueur, les articles suivants, produits du sol ou de l'industrie de la France, seront admis aux Etats-Unis à des droits ne dépassant pas les suivants, savoir:

Tartres bruts, ou lies-de-vin, brutes, cinq pour cent ad valorem;

Cognacs, ou autres spiritueux, ou liqueurs fabriquées, provenant de la distillation de grains ou d'autres matières, un dollar et soixante quinze cents par gallon;

Peintures à l'huile, aquarelles, pastels, dessins et statuaire, quinze pour cent ad valorem;

It est, en outre, convenu de la part des Etats-Unis que les droits imposés et perçus jusqu'ici sur les vins non mousseux, produits de la France, en vertu de la loi douanière des Etats-Unis de 1897, seront co conditionnellement suspendus et qu'en leur lieu et place les droits suivants seront imposés et perçus, savoir:

Vins non mousseux et vermouts, en futs, trente-cinq cents par "gallon"; en bouteilles ou cruchons, par caisse de douze bouteilles ou cruchons ne contenant chacun pas plus de "un quart" et contenant plus de "une pinte," ou par caisse de vingt-quatre

bouteilles ou cruchons ne contenant chacun pas plus de "une pinte," un dollar et vingt-cinq cents par caisse;

et il ser a payé par pinte ou fraction de pinte un droit de quatre cents sur les excédents que contiendraient ces bouteilles ou cruchons; toutefois il ne sera perçu aucun droit distinct ou additionnel sur les bouteilles ou cruchons.

Mais il est expressément entendu que cette dernière concession pourra être révoquée par le Président des Etats-Unis si, par des droits additionnels qu'il jugerait injustes à l'égard du commerce des Etats-Unis, la France surélève les droits auxquels sont actuellement soumis les produits des Etats-Unis.

III.

Le présent arrangement entrera en vigueur à dater du premier Juin mil huit cent quatre-vingt-dix-huit.

Fait et signé en double exemplaire, à Washington, le vingt-huit Mai mil huit cent quatre-vingt dix-huit.

JOHN A. KASSON

JULES CAMBON

President's proclamation of foregoing treaty or agreement (30 Stat., 1774; also published by the Treasury "for the information and guidance of officers of the customs and others concerned," T. D. 19405).

The collector of customs assessed and collected duty on said statuary at 45% ad valorem under Par. 193, *supra* (Report of Collector, Rec., p. 7, fol. 9);

the importers (now appellants) duly filed notice of dissatisfaction, as authorized by Section 14, Act of June 10th, 1890 (26 Stat., at L. 137), which appears in the record as "protest 267,838" (Rec., p. 6, fol. 8). The collector of customs duly transmitted the papers to the Board of General Appraisers, as required by Section 14, *supra,* which overruled the protest and affirmed the collector's decision (Rec., pp. 57-60).

The portion of the Board's opinion to which exception is now taken is as follows:

> "As to the question whether the term 'statuary' in section 3 and the French reciprocity agreement is subject to the definition found in par. 454, we say: This question has been passed upon by the Circuit Court of Appeals in the second circuit in the case of *Richard* v. *United States* (158 Fed. Rep., 1019, T. D. 28601); affirming the decision of the Circuit Court in 151 Fed. Rep., 954 (T. D. 27948), and by the Board in Havemeyer's case, G. A. 5286 (T. D. 24247). These decisions specifically denied the contention of the importers in this case. We therefore overrule the protest on this claim" (Rec., p. 58).
>
> "The protest is overruled and the decision of the collector will stand" (Rec., p. 60).

Appeal from the foregoing decision was duly filed in the U. S. Circuit Court for the Southern District of New York (Rec., pp. 1-5), as authorized by Section 15, Act of June 10, 1890, as amended by Act of May 27th, 1908 (35 Stat., at L. 404), which Court affirmed the Board without opinion "on the authority of *Tiffany* v. *United States,* 71 Fed. Rep., 691, and *Richards* v. *United States,* 151 Fed. Rep., 954" (Rec., p. 64). The Tiffany case has no application to the question now presented.

Thereupon the importers appealed to this Court making the following assignments of error, which are the only ones now relied upon:

> 1. In not holding that the commercial agreement between the United States and France, as proclaimed by the President of the United States (T. D. 19405), was to be in full scope according to its language without being in any way restricted or modified by the definition contained in paragraph 454, section 1 of the Tariff Act of July 24, 1897, but which definition was not embodied either in the commercial agreement itself or in the President's proclamation thereof.
>
> 2. In not holding that the term "statuary" as used in section 3 of the Tariff Act and in said commercial agreement with France or the President's proclamation thereof, was not subject to the definition contained in paragraph 454, Schedule N, Section 1, of said Tariff Act.
>
> 3. In not holding the merchandise dutiable at 15% ad valorem under section 3 of the Tariff Act and the commercial agreement with France and the President's proclamation thereof.
>
> 7. In holding the merchandise dutiable at 45% under paragraph 193 as manufactured metal.
>
> 8. In affirming the decision of the Board of General Appraisers.
>
> 9. In not reversing the decision of the Board of General Appraisers and of the Collector of the Port and holding the merchandise dutiable at either 15% under section 3 and the Commercial Agreement with France, as proclaimed by the President, or * * * (Rec., pp. 66, 67).

On May 2, 1910, a motion to dismiss or affirm was submitted to this Court by the appellee (The

United States), and on May 16, 1910, the Court entered its order postponing the consideration of said motion until the hearing of the case. As said motion alleged want of jurisdiction in this Court, it is presumed that question will be raised again, and it is therefore discussed here.

The jurisdiction of this Court rests upon Section 5, Act of March 3, 1891 (26 Stat., at L., pp. 827 and 828), which provides:

> "That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases:
>
> * * * * * * *
>
> In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question."

This case, it is believed, does not involve the constitutionality of any law of the United States, as the constitutionality of Section 3 of the Act of 1897, *supra*, can hardly be drawn in question since the decision of this Court in *Field* v. *Clark*, 143 U. S., 649, upholding the constitutionality of Section 3, Act of Oct. 1, 1890 (26 Stat., 612), which was similar to the present Section 3, although narrower in scope. Nor is any question raised by the appellant as to the validity of a treaty, but we argue that it does involve the construction of a treaty. The position of the Government in its brief on the motion to dismiss or affirm was that this international agreement was not a treaty. We shall, therefore, first endeavor to show the Court that it is a treaty.

The second question, to be discussed afterward,

is whether the word "statuary," used without qualification in this treaty (as we call it) is to be taken in its natural meaning as including all kinds of statuary, or is to have grafted upon it a limitation contained in the Act of Congress, not in any way referred to by implication or otherwise, and of which no notice was given to the other party to the contract—the Republic of France. The French nation and people were unquestionably led to believe that the written contract expressed all the terms agreed upon, and that the President of the United States was duly authorized to make the contract that he did make. Consequently, for a purpose which is no less than to uphold the good faith of the United States in its international dealings (although in this case the interests of private parties only are directly affected), it seems proper to adopt liberal interpretations where necessary to give the treaty effect. Reserving the detailed argument on this question for later discussion, we now proceed with the question of the Court's jurisdiction.

ARGUMENT.

I.

The so-called agreement with France is a treaty.

The Government's view apparently is that no international agreement is a treaty unless made by the President and Senate alone, and that the concurrence of the House makes it something else.

The President and Senate undoubtedly have complete control of the making of treaties, so long as they refuse to join with the House of Representatives in making a treaty by act of Congress. There is a practical limitation to their power of carrying treaties into execution in cases where an act of Congress is necessary for that purpose, but that is a separate matter from their power to *make* treaties, which is unqualified. The House, therefore, has no right to demand any agency or share in the making of treaties, but has only a right to demand a share in the legislation, if any be necessary, to make them effective. If, however, the President and Senate voluntarily join with the House in the enactment of a law which authorizes the making of a treaty, and provides for its taking effect upon proclamation by the President, such action includes the approval of the President, the advice and consent of the Senate, and the legislation required to put it into execution.

It is not necessary in this particular case, to decide whether the whole Congress has a concurrent power to make *any* kind of a treaty. It is sufficient if it had power to make this one, the subject-matter of which clearly partakes of the legislative character, and is, therefore, within Art. I,

Sec. 1 of the Constitution, declaring that "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." It also fixed rates of duties to be collected on articles imported from a foreign country, and is, therefore, within the specific legislative powers expressly granted to Congress in Art. I, Sec. 8, "to lay and collect taxes, duties. imposts and excises" and "to regulate commerce with foreign nations." If it had first been made by the President and Senate, it would have required a subsequent Act of Congress to carry it into effect, in view of Art. I, Sec. 7, which requires that "all bills for raising revenue shall originate in the House of Representatives." The required act of Congress was passed first, and is just as effective as if it had been passed afterward.

The method of passing the act first was probably the only practical method of accomplishing the object. With the great number of different classes of articles and rates of duty in our tariff acts, and the various reasons moving Congress to impose them—such as discrimination against articles of luxury and in favor of necessities, the collection of sufficient revenue, the protection of American products, and the admission of raw materials for American industries either free or with light burdens—how could it be expected that the President could, on his own initiative, make a treaty changing such rates that would meet the approval not only of the Senate but of the more numerous House of Representatives? He apparently has succeeded in doing that in a few instances, notably the treaty with Hawaii in 1875 (19 Stat., at L. 625), but there was a signal failure to accomplish it under Section 4

of the Act of 1897, in which Congress suggested to the President the negotiation of treaties, to be approved by the Senate and also by act of Congress. This section did not suggest any articles to be included in such agreements, nor any new rates except that the reduction should not be more than 20% of the regular rates. We say "suggested" because the section did not confer any authority on the President and Senate that they did not already have under the Constitution. It amounted, however, to a declaration of policy on the part of Congress, and an indication that it would probably approve a reduction not exceeding 20% on articles selected by the President. Notwithstanding this, no treaty was ever concluded under it. A treaty with France was negotiated by the President (Senate Doc. No. 22, 56th Cong., 1st Session), but it is believed the Senate refused its consent in executive session, and it was never put to the test of Congressional debate and action. On the other hand, where Congress passes an act, as in Section 3, approving in advance certain specified reductions on specified articles, the President is enabled to make a definite offer to the foreign government, and this method did result in the consummation of a number of agreements.

It would, therefore, seem that the power to pass a law authorizing the President to make a treaty reducing rates of duty in consideration of reciprocal reductions by a foreign nation, is an exercise of the power in the last clause of Art. I, Section 8, "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers," etc. Concerning this clause, the Court said:

> "It is impossible to know what those non-enumerated powers are, and what is their

nature and extent, without considering the purposes they were intended to subserve. Those purposes, it must be noted, reach beyond the mere execution of all powers definitely intrusted to Congress and mentioned in detail. They embrace the execution of all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof. * * * That would appear, then to be a most unreasonable construction of the Constitution which denies to the government created by it, the right to employ freely every means, not prohibited, necessary for its preservation, and for the fulfilment of its acknowledged duties. Such a right, we hold, was given by the last clause of the eighth section of the first article. The means or instrumentalities referred to in that clause, and authorized, are not enumerated or defined. In the nature of things enumeration and specification were impossible, but they were left to the discretion of Congress, subject only to the restrictions that they be not prohibited, and be necessary and proper for carrying into execution the enumerated powers given to Congress, and all other powers vested in the Government of the United States, or in any department or officer thereof."

Legal Tender Cases, 12 Wall., 457, 533.

"'Congress,' said this Court, 'must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the Constitution.'"

Ibid., p. 538, quoting from *Fisher* v. *Blight*, 2 Cranch, 358.

A. The mere designation of the instrument by another name, even by Congress and the President, does not prevent its being a treaty, if it is such in substance.

> "If it be true that by varying the form, the substance may be changed, it is not easy to see that anything would remain of the limitations of the Constitution, or of the rule of taxation, and representation, so carefully recognized and guarded in favor of the citizens of each state. But constitutional provisions cannot thus be evaded. It is the substance and not the form, which controls, as has indeed been established by repeated decisions of this Court."
>
> *Pollock* v. *Farmer's L. & T. Co.*, 157 U. S., 429, quoted with approval in *Fairbank* v. *United States*, 181 U. S., 283.

Treaties have quite frequently been denominated conventions, but that does not change their nature as treaties. This Court, in a case involving other questions, referred to one of these conventions as "the existing commercial *treaty* between the United States and the King of Denmark, styled 'General *Convention* of Friendship, commerce and navigation,'" and to another as "the *treaty*, or *convention as it is termed*, between the King of the Hawaiian Islands and the United States." (Italics ours.)

> *Bartram* v. *Robertson*, 122 U. S., 116, 118.

If a treaty remains a treaty when called a convention, it would seem equally to remain a treaty when called an agreement.

Congress has referred to said treaty with the King of the Hawaiian Islands in two instances as a convention, and in two others as a treaty.

> Act Aug. 15, 1875 (19 Stat., at L. 200).
> Act Mar. 3, 1891 (26 Stat., at L. 844).
> Act Aug. 27, 1894, par. 182½ (28 Stat., at L. 521).

Act July 24, 1897, par. 209 (30 Stat., at L. 168).

B. In the general sense and without special reference to the constitution and laws of the United States, the so-called commercial agreement with France is unquestionably a treaty.

It is believed there is no decided case involving directly the question whether a certain instrument was a treaty or not.

There are cases which incidentally state that a treaty is "a contract between nations," as *Foster* v. *Neilson*, 2 Pet., 253, 314, but the question decided was as to the effect of the treaty, not as to whether it was a treaty. Again, Mr. Chief Justice TANEY, in *Holmes* v. *Jennison*, 14 Pet., 540, said:

> "For whenever we say 'a treaty' we mean an instrument written and executed with the formalities customary among nations" (p. 571).

and quoted Vattel's definition that

> "a treaty, in Latin, *foedus*, is a compact made with a view to the public welfare, by the superior power, either for perpetuity or for a considerable time";

also other views of Vattel, as to distinctions between treaties, agreements, conventions, etc., which do not appear to have been followed in practice. But the question in that case was whether the extradition of persons charged with crime was prohibited to the States, and as the State had made no written or formal agreement with the foreign country, there was no treaty, but it was held that the mere delivery of a prisoner by the State and the acceptance of such delivery by the foreign country

would constitute an agreement, which the State was prohibited by the Federal Constitution from entering into, the Court thus giving the word agreement as used in the Constitution "its most extended signification." The decision was not conclusive, on account of the equal division of the eight justices sitting, but Mr. Chief Justice TANEY'S opinion was followed by the Supreme Court of the State of Vermont, and was subsequently approved by this Court in *United States* v. *Rauscher,* 119 U. S., 407.

Again, in *Whitney* v. *Robertson,* 124 U. S., 190, the Court said:

> "A treaty is primarily a contract between two or more independent nations, and is so regarded by writers on public law,"

but that statement was made in connection with a ruling that the treaty was controlled by a later statute.

This contract with France was between two independent nations; it was a formal contract, written in both French and English, signed by both parties and duly proclaimed by the President and also by the Secretary of the Treasury; it was upon consideration—a promise for a promise; it was "for a considerable time" and furnished a rule for almost daily action during its continuance; it was for the public welfare, and made in the name of the State, and was actually executed for a period of eleven years, its termination having been directed by Section 4, Act of August 5th, 1909 (36 Stat., at L. 83).

C. In the constitution and laws of the United States, the word "treaty" has no special meaning different from the general definition.

The actual question here is the meaning of the word "treaty" in the Act of March 3, 1891, but assuming that the act uses the word in the same sense that it is used generally in the Constitution and Laws of the United States, and in view of the absence of any direct decision of this Court, we turn to the various clauses of the Constitution itself, the objects for which the powers were granted, and the construction since adopted by the Legislative and Executive Departments.

Legal Tender Cases, 12 Wall., 457, 531.

Article VI of the Constitution makes treaties (together with the Constitution and acts of Congress), the Supreme law of the land. Their effect or status is therefore different in the United States from that usual in other nations, where they are, as a rule, simply international contracts, but that is merely a difference in effect or status, and calls for no different definition of what is a treaty. It does not make a treaty any the less an international contract, but adds to it the authority and quality of an act of Congress. The only practical difference is that, in this country, it is directly enforceable by the judicial department so far as it is self-executing and fixes the rights of private parties. But so far as its language imports a promise to legislate, it does not assume the character of a statute, but remains purely and simply a contract between nations.

Foster v. *Neilson,* 2 Pet., 253, 314.

Article II, Section 2, implies that the power of the President and Senate to make treaties is not exclusive, because it is immediately followed by the power to appoint officers, which is distinctly

made exclusive, subject only to the express exception annexed thereto. The whole sentence vesting the treaty-making power in the President and Senate is as follows:

> "He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments."

The difference in language is at once apparent. In the one case he "shall have power"; in the other, he "shall nominate" and "shall appoint." Power is given to make treaties; the duty is imposed to *appoint* officers.

Article VI also uses the word treaties as embracing some not made by the President and Senate, viz., those previously made under the Articles of Confederation, when they were made by Congress, there being no President and no Senate. Regarding this clause, the Court said:

> "It will be observed that the treaty-making clause is retroactive as well as prospective. The treaty in question in *Ware* v. *Hylton,* was the British treaty of 1783, which terminated the war of the American Revolution. It was

made while the articles of confederation subsisted. The Constitution, when adopted, applied alike to treaties 'made and to be made.'"

Hauenstein v. *Lynham*, 100 U. S., 483, 489.

D. The reason for vesting the power to make treaties in the President and Senate appears to have been simply to secure secrecy and despatch, which, it was recognized, were often necessary, and except for this consideration, the power would doubtless have been expressly vested in Congress as a whole.

"Mr. Wilson moved to add after the word 'Senate' the words 'House of Representatives'" (in the treaty-making clause), "as treaties, he said, are to have the operation of laws, they ought to have the sanction of laws also. The circumstance of secrecy in the business of treaties formed the only objection, but this, he thought, so far as it was inconsistent with obtaining legislative sanction, was outweighed by the necessity for the latter.

Mr. Sherman thought the only question that could be made was whether the power could be safely trusted to the Senate. He thought it could; and that the necessity of secrecy in the case of treaties forbade a reference of them to the whole Legislature."

Madison, Journal of Const. Conv. of 1787, edited by Hunt, Vol. II, p. 327.

"Some members were for vesting the power to make treaties in the Legislature, but the secrecy and despatch which are so frequently necessary in negotiations evinced the impropriety of vesting it there. The same reason

showed the impropriety of placing it solely in the House of Representatives. A few members were desirous that the President alone might possess this power," etc.

Chas. Pinckney, Elliott's Debates in State Conventions on Adoption of Federal Constitution, Vol. IV, pp. 253-267.

Wherever secrecy is necessary, it is to be presumed the President and Senate will maintain it, and will make all such treaties themselves, and that only in cases where secrecy is not required will they consent to an act of Congress authorizing a treaty. So the reason that moved the makers of the Constitution to authorize the President and Senate to make treaties, is not a reason why the whole Congress should not have the concurrent power. On the contrary, the statesmen of that time would have preferred the entire Congress, if secrecy could have been maintained.

E. As to executive and legislative construction:

In 1796, the House of Representatives passed a resolution asking the President for the instructions to the Minister of the United States who negotiated the treaty which had been concluded with Great Britain by the President and Senate, and for the correspondence and documents relative to said treaty.

Annals of Congress, 4th Cong., 1st Sess., p. 759.

President Washington declined to comply on the ground "that the power to make treaties is exclusively vested in the President, by and with the advice and consent of the Senate." His message

appears in full on the same page of the Annals. After extended debate, the House adopted the following resolutions:

> "*Resolved,* That, it being declared by the second section of the second article of the Constitution, 'that the President shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senate present concur,' the House of Representatives do not claim any agency in the making of treaties; but that, when a treaty stipulates regulations on any of the subjects submitted by the Constitution to the power of Congress, it must depend, for its execution, as to such stipulations, on a law or laws to be passed by Congress; and it is the constitutional right of the House of Representatives, in all such cases, to deliberate on the expediency or inexpediency of carrying such treaty into effect, and to determine and act thereon, as, in their judgment, may be most conducive to the public good.
>
> *Resolved.* That it is not necessary to the propriety of any application from this House to the Executive, for information desired by them, and which may relate to any constitutional functions of the House, that the purpose for which such information may be wanted, or to which the same may be applied, should be stated in the application." (ibid. p. 771.)

Mr. Madison stated in the debate on the resolution that

> "the message had contested what appeared to him a clear and important right of the House; and stated reasons for refusing papers which, with all the respect he could feel for the Executive, he could not regard as satisfactory or proper." (ibid. p. 773.)

He also expressed the opinion "that the treaty-making power was a limited power." (ibid. p. 777.)

If we read President Washington's message with a view to the situation as it then existed, we may accept his conclusion as correct without affecting this case. The House alone was endeavoring to question, or at least investigate, the negotiations leading up to a treaty which had been duly concluded. If the President had been called upon to consider whether the whole Congress, President, Senate and House, agreeing and participating, had power to make a treaty, he could have consistently taken the ground that they had that power. His statement that the power to make treaties was *exclusively* vested in the President and Senate was too broad when taken by itself, because the situation like that in the present case had not presented itself to his mind.

In any event, his view is not binding on this Court, because it was sharply disagreed to by so able a statesman as Mr. Madison, who was also a member of the Constitutional Convention of 1787, and afterward President, and it had not the sanction of long practice, but was only a single transaction.

In 1816, the question was discussed by Congress whether legislation was necessary to carry a certain treaty into effect, the House proposing to pass an act to carry a treaty into effect, to which the Senate disagreed, and a conference of the two houses was called. Mr. Forsythe, manager of the conference on the part of the House, said:

> "Your committee understood the committee of the Senate to admit the principle, contended for by the House, that whilst some treaties might not require, others may require legis-

lative provision to carry them into effect. That the decision of the question, whether such provision was necessary, must be founded upon the peculiar character of the treaty itself. As to the late convention, the immediate subject of controversy, the Senate doubted whether any act of legislation was necessary, but, since it was deemed important by the House that the act should be passed, they had no objection to giving it their sanction, provided a precedent was not established, binding them hereafter to assist in passing laws, in cases in which such doubts might not exist."

Annals of Congress, 14th Cong., 1st Sess., p. 1022.

The bill passed, ibid. p. 1057.

The most that can be said of the discussion in 1816 is that the Senate evinced a desire to retain intact all the authority it had in the matter of treaty making. Their authority is not attacked in this case.

The foregoing views of the executive and legislative branches have little or no bearing on this case. We now come to a legislative interpretation that is highly important.

In 1872, a law was enacted by Congress, which afterward became with unimportant verbal changes, a section of the U. S. Revised Statutes, as follows:

"For the purpose of making better postal arrangements with foreign countries, or to counteract their adverse measures affecting our postal intercourse with them, the Postmaster General, by and with the advice and consent of the President, may negotiate and conclude postal treaties or conventions, and

may reduce or increase the rates of postage on mail matter conveyed between the United States and foreign countries."

Act of June 8th, 1872, 17 Stat., at L. 304, Sec. 398, U. S. R. S.

In pursuance of this statute, the treaty of Berne was entered into October 9, 1874 (19 Stat., at L. 577), and was ratified by the Postmaster General by and with the advice and consent of the President (ib. 588), and the "final protocol" was ratified in the same way (ib. 589). Article XIII of that treaty (ib. 583) authorized "detailed regulations" to be made by the plenipotentiaries, and the 25th article of these detailed regulations (ib. 604) was held by this Court to be binding as a treaty and as the law of the land. The Court referred to the "25th article of the protocol," but what was intended was the 25th article of the detailed regulations.

Cotzhausen v. *Nazro*, 107 U. S., 215, 217.

Here was a treaty—so denominated by Congress, the President and the foreign nations—the first step in the making of which was an act of Congress. The advice and consent of the Senate was given in that act of Congress, and was not given otherwise at any time. In the *Cotzhausen* case, *supra*, it was not contended that the instrument was not a treaty (at least, so far as the opinion shows), but that act of Congress and the treaty made thereunder was an actual exercise by the whole Congress of the treaty-making power.

In 1878, Congress passed an act which was tantamount to an offer to a foreign nation, which,

when accepted by it, constituted a treaty in substance, although not incorporated into one document signed by both parties. That act granted certain rights to Canadian vessels in waters of the United States, but the act was not to become effective until Canada extended the same privilege to American vessels in Canadian waters, and was to continue in effect only so long as Canada continued to extend the same privileges. Canada extended the privilege and an agreement was thus entered into, which would have been unconstitutional if the Congress had not power to make treaties, as it would have been doing by indirection that which could not be done directly. Act of June 19, 1878 (20 Stat., at L. 175), amended May 24, 1890 (26 Stat., at L. 120), and again March 3, 1893 (27 Stat., at L. 683). All these were acts of Congress, passed by both houses and approved by the President.

The Secretary of the Treasury, in official documents, has frequently referred to this contract with France, and others made in the same manner and by the same authority with other countries, as treaties (Treas. Dec. 19405, in a note appended to the President's proclamation; T. D. 21886, 22277, 22353, 23954). The Board of General Appraisers has done the same (T. D. 23166, 24971, 25442, 26208, 29070, 30490, 31202). This oft-repeated use of the word "treaty" as applied to these so-called commercial agreements indicates a general understanding in the executive departments that they are treaties.

In some court decisions this particular agreement with France has been called a treaty, without discussion as to the exact meaning of the word.

Nicholas v. *United States,* 122 Fed. Rep., 892.

Migliavacca Wine Co. v. *United States,* 148 Fed. Rep., 142.

Shaw v. *United States,* 1 Cust. App., 426, also reported T. D. 31500.

F. Section 3 of the Act of 1897, *supra,* was an expression of the advice and consent not only of the Senate, but also the House of Representatives.

The Constitution, in conferring the power to make treaties, does not prescribe the time or method of the Senate giving its advice and consent. It can as well be given before negotiations as after, and certainly the consent of the whole Congress is not inferior to the consent of the Senate alone. In a case where the States of Virginia and Kentucky entered into a contract with the approval of Congress previously expressed, according to Art. I, Sec. 18, of the Constitution, the Court said:

> "Let it be observed in the first place, that the Constitution makes no provision as to the mode or form in which the consent of Congress is to be signified, very properly leaving that matter to the wisdom of that body, to be decided upon, according to the ordinary rules of law, and of right reason."

Green v. *Biddle,* 8 Wheat. 1, 85.

Poole v. *Fleeger,* 11 Pet., 185, 209, affirming

Fleeger v. *Poole,* 1 McLean, 185, Fed. Cas. No. 4860.

Virginia v. *West Virginia,* 11 Wall., 39, 59.

In like manner, the consent of the Senate to a treaty may be given before or after negotiations and perhaps might even be implied from legislation as in *Virginia* v. *West Virginia, supra,* as the Constitution says nothing about the mode or form. The word "advice" perhaps suggests action preceding negotiations, and the word "consent" subsequent approval.

G. The supreme legislative authority in the United States is Congress (Const., Art. I, Sec. 1). The power of the President and Senate to make treaties is necessarily subordinate in some respects.

Congress has the sole power to declare war, which abrogates or suspends all treaties, prospectively, at least. Treaties may be repealed by act of Congress. Many treaties are practically a nullity unless or until approved by act of Congress, such as those promising the payment of money, or some other act which can be performed only by statute. In this particular case, it is probable that a treaty made by the President and Senate alone would not have been effective without the concurrence of the House, since "all bills for raising revenue shall originate in the House of Representatives" (Const., Art. I, Sec. 7). In this instance, the necessary approving act of Congress was passed before the negotiations instead of after. That act first selected and specified certain articles of merchandise (Sec. 3, Act of 1897, *supra*), and advised and authorized the President to enter into agreements with foreign nations to substitute certain specified lower duties on those articles for the rates in force generally, and gave their approval in advance by declaring that such agreements were to be made effective by proclamation of the Presi-

dent. This avoided the necessity of a subsequent act of Congress to carry the treaty into effect, and it embodied the advice and consent of the Senate and was superior thereto.

In holding that a treaty could be repealed by an act of Congress, the Court said:

> "A treaty is made by the President and the Senate. Statutes are made by the President, the Senate and the House of Representatives. *The addition of the latter body to the other two in making a law certainly does not render it less entitled to respect in the matter of its repeal or modification than a treaty made by the other two. If there be any difference in this regard, it would seem to be in favor of an act in which all three of the bodies participate.* And such is in fact the case in a declaration of war, which must be made by Congress, and which, when made, usually suspends or destroys existing treaties between the nations thus at war." (Italics ours.)
>
> *Head Money Cases,* 112 U. S., 580, 599.

The more or less general use of the word "agreement" instead of "treaty" as applied to these reciprocal commercial contracts is naturally accounted for in two ways:

(1) The Constitution expressly grants to the President and Senate the power to make treaties; in the grant to Congress of "all legislative power" and power to lay and collect duties, and to regulate commerce with foreign nations, treaties are not mentioned by name; but they are none the less included. The power to make treaties is a portion of the legislative power, since treaties are declared by the Constitution to be part of "the

supreme law of the land." But it is only a small part of the legislative power, and the greater includes the less. Still, the absence of a reference to "treaties" *eo nomine* in the enumeration of the powers of Congress conduces to the use of words like "agreements," and "arrangements," with reference to international contracts made under the authority of the whole Congress. Notwithstanding this, as shown above, the usage has not been uniform.

(2) The Tariff Act of 1890 (Sec. 3, 26 Stat., at L. 612), provided for the first reciprocal arrangements of duties in our history, which were first authorized by act of Congress and then negotiated. That act provided for a proclamation by the President when he was satisfied that a foreign nation granted reciprocal concessions. It did not specifically direct him to make "agreements." In practice, he issued proclamations when he had received assurances from the foreign countries that they had passed laws extending reciprocal concessions, thus practically entering into "agreements," using that word in its broad signification and the word "agreements" was quite generally applied to those arrangements. But in no case under that act was a document drawn up and signed by representatives of both nations. Those arrangements probably would not be called treaties, because not formal written documents. But that practice naturally led Congress in 1897, when re-enacting and extending the reciprocity policy, to use the word "agreements," and, under this act, formal written documents were prepared and signed by the representatives of both nations, and they were, in fact and substance, treaties.

H. It is within the spirit and intent of the Act

of March 3, 1891, *supra*, to give this Court jurisdiction in this case.

The general purpose of that act is well understood to have been to relieve the calendar of this Court of all cases except those of general public importance. Section 5 enumerates the classes of cases which the Congress considered of sufficient consequence to preserve the right of appeal to this Court, and includes cases involving the validity or construction of any treaty made under the authority of the United States. The reason for including these cases must have been the presence of an international obligation, which was regarded as requiring decision by the highest authority. An international obligation is present in this case, which, therefore, seems to be within the reason and spirit of this law, which should be respected in the decision of jurisdictional questions, as well as others.

Durousseau v. *United States*, 6 Cranch, 307, 314.

II.

If the agreement with France is a treaty, this Court has jurisdiction of the entire case.

Horner v. *United States*, 143 U. S., 570, 576.

III.

The term statuary in the treaty with France includes all kinds or species of statuary, of any material and made by any process.

A name of an article used in a statute without qualification, includes that article in all its forms

and species. Thus, a provision for "tapioca" was held to include tapioca in its three forms—pearl, flake and flour.

> *Chew Hing Lung* v. *Wise,* 176 U. S., 156, 160.
> *Schoellkopf, et al.,* v. *United States,* 71 Fed. Rep., 694.

There is absolutely nothing on the face of the treaty to indicate any limitation of the term statuary to a particular class of statuary. Art. II begins as follows:

> "It is reciprocally agreed on the part of the United States in accordance with the provisions of Section 3 of the United States Tariff Act of 1897, that," etc.

Section 3, therein referred to contains no intimation, express or implied, that the term statuary was subject to any limitation or was used in other than its natural and ordinary meaning. The Government and people of France were entitled to assume that all statuary from France was to be admitted into the United States at a duty of 15 per cent ad valorem. Even if they were so cautious as to refer to Section 3, of our tariff act, they would find nothing to the contrary.

> "Where a treaty admits of two constructions, one restrictive as to the rights, that may be claimed under it, and the other liberal, the latter is to be preferred. *Shanks* v. *Dupont,* 3 Pet. 242. Such is the settled rule in this Court."
>
> *Hauenstein* v. *Lynham,* 100 U. S., 483, 487.

"If, as claimed by the plaintiff in error, the treaty of 1880, fairly interpreted, secured to him, at the time of his departure for Honolulu, the right to go from and return to the United States at pleasure, without being subjected to regulations or conditions affecting the substance of that right, the Court should be slow to assume that Congress intended to violate the stipulations of a treaty, so recently made with the government of another country. 'There would no longer be any security,' says Vattel, 'no longer any commerce between mankind, if they did not think themselves obliged to keep faith with each other, and to perform their promises.' Vattel, Book 2, ch. 12. And as sovereign nations, acknowledging no superior, cannot be compelled to accept any interpretation, however just and reasonable, 'the faith of treaties constitutes in this respect all the security of contracting powers.' Ib. ch. 17. 'Treaties of every kind,' says Kent, 'are to receive a fair and liberal interpretation, according to the intention of the contracting parties, and are to be kept in the most scrupulous good faith.' 1 Kent Com. 174. A treaty that operates of itself without the aid of legislation is equivalent to an act of Congress, and, while in force, constitutes a part of the supreme law of the land. *Foster* v. *Neilson,* 2 Pet., 253, 314. Aside from the duty imposed by the Constitution to respect treaty stipulations when they become the subject of judicial proceedings, *the Court cannot be unmindful of the fact that the honor of the government and people of the United States is involved in every inquiry whether rights secured by such stipulations shall be recognized and protected.* And it would be wanting in proper respect for the intelligence and patriotism of a co-ordinate department of the government were it to doubt, for a moment, that these considerations were present in the minds of its members when the legislation in question was enacted." (Italics ours.)

Chew Heong v. *United States*, 112 U. S., 536, 539.

"There is something, too, which shocks the conscience, in the idea that a treaty can be put forth as embodying the terms of an arrangement with a foreign power or an Indian tribe, a material provision of which is unknown to one of the contracting parties, and is kept in the background to be used by the other only when the exigencies of a particular case may demand it. The proviso never appears to have been called to the attention of the tribes, who would naturally assume that the treaty embodied in the presidential proclamation contained all the terms of the arrangement. It is true that the proclamation recites that the Senate did on March 25, 1840, resolve that the treaty 'together with the amendments proposed by the Senate of the 11th of June, 1838, have been satisfactorily acceded to and approved of by said tribes,' but, as the proclamation purported to set forth the treaty 'word for word' as so amended, of course the amendments referred to were those embodied in the treaty as published in the proclamation."

New York Indians v. *United States*, 170 U. S., 1, 23.

That is a very close case in principle to this. The published presidential proclamation of the treaty with France (30 Stat., at L. 1774, and T. D. 19405) contains no intimation that the statuary therein referred to was to be only professional productions of sculptors.

The Court explains that the particular amendment adopted by the Senate and not included in the treaty and proclamation, did not have the ap-

proval of the President and was, therefore, not effective as an amendment. A strict and technical view would have been that the treaty as finally ratified and proclaimed by the President did not have the full and complete consent of the Senate, and, therefore, was no treaty. But the Court apparently did not regard this view with sufficient seriousness to even mention it.

"Obviously the treaty must contain the whole contract between the parties," quoting *New York Indians* case, *supra.*

> *Fourteen Diamond Rings,* 183 U. S., 176. Concurring opinion by Mr. Justice BROWN, at p. 183.

> "The treaty is the contract of both parties. * * * The words are the words of both parties. * * *"

> *Meigs* v. *McClung's Lessee,* 9 Cranch, 11.

The intention should not be imputed to Congress to limit the statuary of Section 3 by a clause which was "kept in the background," in the midst of a long and involved statute. The provision on which the Government relies is obscurely placed as a proviso to Par. 454 of the Tariff Act of 1897 (30 Stat. at L. 194). That paragraph reads as follows:

> "454. Paintings in oil or water colors, pastels, pen and ink drawings, and statuary, not specially provided for in this act, twenty per centum ad valorem; but the term 'statuary' as used in this act shall be understood to include only such statuary as is cut, carved or otherwise wrought by hand from a solid block or mass of marble, stone or alabaster, or from

> metal, and as is the professional production of a statuary or sculptor only."

This paragraph provides only for such statuary as is "not specially provided for in this act," and statuary from France is specially provided for in Section 3. Not being within the purview of the paragraph, it should not be construed to be within the proviso thereto. The use of the word "but" instead of "provided" is not important, the meaning being the same.

> "The office of a proviso, generally, is either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it, as extending to cases not intended by the Legislature to be brought within its purview."
>
> *Minis* v. *United States*, 15 Pet., 423, 445.
> *United States* v. *Dickson*, 15 Pet. 141, 165.
> *White* v. *United States*, 191 U. S., 545, 551.

The words "in this act" may perhaps have some effect beyond the paragraph itself by constituting a limitation upon the word statuary as used in Par. 649 (free list). All the provisions of the regular dutiable and free lists may be regarded as one complete schedule for ordinary and daily administration, all being in effect at one time and applicable to importations from foreign countries generally. They are all co-ordinate and to be construed as parts of one whole. But Section 3 is a thing apart. It did not, *ex proprio vigore*, fix any rate of duty, or provide for the free admission of

any articles. It could not operate contemporaneously with Sections 1 and 2, as to the same importation. The moment it is effective, Sections 1 and 2 are suspended *pro tanto.*

This view is confirmed by the opening provisions of Section 1 (dutiable list) and Section 2 (free list) as follows:

> "That on and after the passage of this act, *unless otherwise specially provided for in this act,* there shall be levied, collected, and paid upon all articles imported from foreign countries, and mentioned in the schedules herein contained, the rates of duty which are, by the schedules and paragraphs, respectively prescribed, namely:" (Italics ours.)

30 Stat., at L. 151.

"Free List.

> Sec. 2. That on and after the passage of this act, *unless otherwise specially provided for in this act,* the following articles, when imported, shall be exempt from duty:" (Italics ours.)

30 Stat., at L. 194.

Barber v. *Schell,* 107 U. S., 617, 620.

These provisions make it clear that Section 3 is an independent provision. When it became operative as to statuary, all provisions of Sections 1 and 2 having any bearing on statuary, were suspended.

The alternative interpretation—extending the proviso to Section 3—means that the President exceeded his authority in concluding and proclaim-

ing the treaty with France, either because he overlooked the proviso to Par. 454, or deemed it not to apply to Section 3. It should be presumed that he acted within his authority, unless it is clear that he did not.

In a case involving this same "commercial agreement" with France, Judge TOWNSEND, in the Circuit Court for the Southern District of New York, very properly regarded the agreement as the principal thing, and made practically no comment on the terms of the Tariff Act. The article in question was chartreuse, known as a cordial or liqueur. The learned Judge said, in part:

> "While the language of the agreement as printed in English does not contain the word 'liqueurs,' yet, inasmuch as the agreement presented by this government to the French government, and the representations connected therewith, by means of which the agreement may be supposed to have been concluded, did expressly include such liqueurs therein, this construction must be adopted and enforced. The foreign manufacturer having presumably acted on the faith of this agreement, should not now be deprived of the benefit thereof because of a possible difference of understanding as to its terms in this country."
>
> *Nicholas* v. *United States*, 122 Fed. Rep., 892.

No appeal was taken from that decision (T. D. 22314), and all cases pending at that time were settled accordingly by the Government. Subsequently, the Secretary of the Treasury issued instructions that another case be prepared for trial (T. D. 22557). The result was that Judge TOWN-

SEND'S decision was followed by the Circuit Court four years later in *United States* v. *Luyties,* 124 Fed. Rep., 977, and *United States* v. *Wile,* 124 Fed. Rep., 1023. The two latter cases were appealed, and the decision of the Circuit Court affirmed in both, the chief opinion of the Circuit Court of Appeals being in *United States* v. *Wile,* 130 Fed. Rep., 331. The Court of Appeals stated "that the commercial agreement cannot extend the scope of Section 3 of the Tariff Act," but held that the clause, "brandy and other spirits manufactured or distilled from grain or other materials" as used in that section were used in their broad sense, and included chartreuse and other cordials and liqueurs, notwithstanding the same words in Par. 289 of the Tariff Act were used in a narrower sense, being subject to an exception of cordials, etc., which were separately and specifically provided for in Par. 292.

In the present case, it is not contended that the commercial agreement extends the scope of Section 3. It is here contended that the scope of Section 3 is identical with that of the agreement, and that neither is restricted by a provision in the dutiable schedule of the Tariff Act, and that was the ruling made in the *Wile* case. The particular provision of the dutiable schedule in the *Wile* case was different from the one drawn in question here, but the Court did give this agreement a broad interpretation, according to its obvious spirit and purpose. They did not disapprove Judge TOWNSEND'S opinion in the *Nicholas* case, but adopted what they probably thought was the simplest and safest line of reasoning leading to the same conclusion, and avoiding conflict between the treaty and the two statutory provisions.

The case of *C. B. Richard & Co.* v. *United States,* 158 Fed. Rep., 1019, which was followed by the Board of Appraisers and Circuit Court in this case, was an affirmance without opinion by the Circuit Court of Appeals for the Second Circuit of a decision by the Circuit Court. We must, therefore, look for the Court's reasons to the opinion of the latter Court, 151 Fed. Rep., 954. We find there that the Court was of opinion that the proviso to Par. 454 applied to Section 3, and defined the word statuary as used therein, and that the commercial agreement could not extend the scope of that section, thus practically holding that the President did exceed his authority in making the agreement. It does not appear that the Court considered that the agreement was substantially a treaty or an international obligation, or that the definition of statuary was in a proviso to a paragraph of a different character, or that the paragraph to which the proviso was attached provided only for statuary "not specially provided for in this act." This decision, it is submitted, was erroneous, and is practically under review here.

The appellee will doubtless lay great stress upon the case of *Shaw* v. *United States,* 212 U. S., 559. That case was entirely different from this. It did not involve the validity or construction of a treaty, because the wine there in question had been assessed at 35 cents per gallon, the rate prescribed in the treaty, and there was nothing in the treaty to require any special mode of procedure to ascertain quantity. That was the view taken by the Circuit Court. *Shaw* v. *United States,* 158 Fed. Rep., 648. On direct appeal to this Court, appellants attempted to raise two questions of constitutionality, both of which were clearly frivo-

lous. In their brief, in opposition to the motion to dismiss or affirm, they discussed the merits first, then the two constitutional questions, and when they came to the treaty question, mentioned it only briefly, and without the citation of any authorities except a definition from the Encyclopædia of the Law of England. This Court, in dismissing the appeal, wrote no opinion, but cited two cases, neither of which contained any reference whatever to any treaty, but both of which were based solely on alleged constitutional grounds, which the Court found to be insubstantial.

IV.

The decision of the Circuit Court should be reversed.

Respectfully submitted,
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New York, April 16, 1912.
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Supreme Court, U. S.
FILED
MAY 6 1910
JAMES H. MCKENNEY
Clerk

No. 208

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

B. ALTMAN & CO.,

Plaintiffs in Error,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION TO DISMISS OR AFFIRM.

Brief of Plaintiffs in Error in Opposition.

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In the Supreme Court of the United States.

OCTOBER TERM, 1909.

B. ALTMAN & CO., Plaintiffs in Error, vs. THE UNITED STATES.	No. 792.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION TO DISMISS OR AFFIRM.

BRIEF OF PLAINTIFFS IN ERROR IN OPPOSITION.

I.

The writ of error cannot be dismissed if the court has jurisdiction of the case or if the question of its jurisdiction is one that should be more fully presented and carefully considered than is possible upon this motion.

The Statute under which this case has been brought here is Section 5 of the Court of Appeals Act of March 3, 1891, 26 United States Statutes at Large, 827, and reads as follows:

> "Section 5. That appeals or writs of error may be taken from the District Courts or from the existing Circuit Courts direct to the Supreme Court in the following cases: * * * In any case in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question."

There is no contention here that this case involves the constitutionality of any law of the United States or that any provision of the constitution has been in any way violated in the proceedings sought to be reviewed. The case is here because it is contended by the plaintiffs in error that there has been a disregard or violation of a treaty made under the authority of the United States. The only answers made to this claim by the learned Solicitor General in his brief are three. 1. He announces *ex cathedra* that a reciprocal commercial agreement negotiated under Section 3, of the Tariff Act of 1897 is not a treaty. 2. He states that any doubt that might otherwise exist upon this subject is removed by a provision in Section 4 of the Tariff Act of 1897 for commercial treaties with foreign countries which require ratification by the Senate. 3. He states that "the claim that a commercial agreement is a treaty" was made in terms in Shaw v. United States, 212 U. S. 559, and that the court dismissed the case on motion of the government for want of jurisdiction.

I respectfully insist that none of these reasons is sufficient to justify depriving merchants of their day in court on this question.

The term "treaty" has been the subject of definition in this court, by which it has been given a definition certainly broad enough to cover a solemn agreement between the Government of the United States and the Government of the Republic of France where important stipulations and concessions are made upon both sides.

See

Cherokee Nation v. Georgia, 5 Peters 1, 60;
Worcester v. Georgia, 6 Peters 515, 581;
Fourteen Diamond Rings v. U. S. 183 U. S. 182.

Like all other words, the term "treaty" may be construed in any given statute according to the context in which it is used, the scope, character and intent of the statute and all the surrounding circumstances. We are dealing with a statute which sought to reduce the labors of the Supreme Court of the United States by creating new appellate tribunals whose decisions should be final except in cases of certiorari or certification, and in that statute we find a provision that an appeal may be taken to this court in any case in which "the validity or construction of any treaty made under its (the United States) authority is drawn in question."

It will be noted that the words used are "the validity or construction." If this court has no jurisdiction of the case at bar neither would it have any if the *validity* and not the *construction* of the international agreement under consideration was involved. Can it be possible that Congress meant that if the validity of an agreement between nations was attacked the parties representing the foreign nation or claiming rights under the agreement should not be allowed to come to this court as a matter of right? Can it be that as to the validity or construction of solemn agreements

between this nation and other nations a right to be heard in this court is to be denied on a mere verbal quibble as to the meaning of the term "treaty"? It would certainly seem that anybody that alleges the affirmative of this proposition should be called upon to make some argument in support of it or cite some authority where the point has been discussed and determined in this court, rather than to expect a proposition so grave and far reaching to be determined on his dogmatic assertion.

The second reason assigned is that the word "treaty" is not used in Section 3 and is used in Section 4. It is a very stretched and violent assumption to suppose that in making this distinction the provision of the statute giving parties the right to have the validity or construction of any international agreement determined by the Supreme Court of the United States was in the mind of Congress. In Section 3 they were providing for agreements which might be revoked at the will of the President. In Section 4 they were providing for agreements which should be in force for a fixed time not exceeding five years and which were to cover not only a few articles as in the case of Section 3, but of all articles imported into one country from the other.

Does the mere fact that an agreement is ratified by the Senate make it more solemn and binding than when its terms have been antecedently fixed by an Act of Congress approved by both Houses of Congress and signed by the President?

In the case of Shaw v. United States relied upon by the learned Solicitor General the situation was as follows: A question had been raised as to the construction of a provision in the Tariff Act of 1897 forbidding any allowance for leakage in imported wines or spirits. Careful and elaborate opinions had been written by the Board of General

Appraisers, the Judge in the Circuit Court and the Circuit Court of Appeals, and the parties had applied to this court for a writ of certiorari, which had been denied. It was then sought to bring a similar case involving the same question direct from the Circuit Court into this court on the ground that a provision of the United States Constitution and a question of the construction of a treaty were involved. It is true that on the motion made to dismiss the writ of error the treaty question had been discussed in the brief of the plaintiff in error, but the decision of this court would seem to indicate that this particular question had escaped the attention of the court, for its decision (Shaw v. United States, 212 U. S. 559) reads as follows:

> "Per Curiam: Appeal dismissed for want of jurisdiction. Shaw v. United States, 141 Fed. Rep. 469; United States v. Shaw, 144 Fed. Rep. 329, and opinion of Board of General Appraisers, Shaw v. United States, 203 U. S. 591; American Sugar Refining Company v. United States, decided to-day, 211 U. S. 155."

The decision in 141 Fed. Rep. was that of the Circuit Court on the merits of the leakage claim. The decision in 144 Fed. Rep. was that of the Court of Appeals in the same case. The decision in 203 U. S. was the denial by this court of the writ of certiorari prayed for. None of these decisions nor that of the Board of General Appraisers referred to, in any way refer to this treaty question, which had not been raised in those cases. The only other decision referred to, that of American Sugar Refining Company v. United States, 211 U. S. 155, was one relating to a constitutional question and containing no allusion whatever to the provision of the statute about right of appeal in cases involving the validity or construction of a treaty.

We respectfully insist that this question of the right to appeal to this court in a case involving the validity or construction of an agreement between this nation and another is not one which should be summarily disposed of by the dismissal of an appeal without opportunity for full argument and discussion. This question should be reserved for a full hearing on the argument of the case when reached.

II.

As to the motion to dismiss, the only reference to it in the memorandum filed by the learned Solicitor General is his statement on page 1 thereof that "the question involved is so frivolous as not to need further argument." I shall not embrace the opportunity to follow so distinguished an example by contenting myself with the mere assertion that the matter involved is *not* frivolous and *does* need further argument. The record in the case shows that in 1896 the Circuit Court of Appeals for the Second Circuit decided (Tiffany v. United States, 71 Fed. Rep. 691) that paragraph 465 of the Tariff Act of 1890, which read as follows:

> "465. Paintings in oil or water colours and statuary not otherwise provided for in this act, fifteen per centum ad valorem; but the term 'statuary' as herein used shall be understood to include only such statuary as is cut, carved or otherwise wrought by hand from a solid block or mass of marble, stone or alabaster, or from metal, and as is the professional production of a statuary or sculptor only,"

excluded from its terms all metal statuary that was not carved or otherwise wrought by hand from metal, and therefore excluded all cast statuary,

which thus became dutiable as a manufacture of metal at 45%.

In the case of United States v. Tiffany, 160 Fed. Rep. 408, the same court decided that a cast bronze statue designed by an artist Gerome was included in a paragraph identical in language with the one from which the court had excluded it under the Act of 1890, saying:

> "The paragraph does not say that the statue must be wrought exclusively by the hand of the sculptor, it recognizes the well-known fact that the great bulk of the carving is done by skilled workmen. Here the entire work was done under the supervision of the sculptor and the finishing touches were added by his own hand, at least the evidence warrants such a presumption. Neither does the paragraph require that the entire work on the statue must be by hand. Bronze statues, as is well known, are cast from models precisely as marble statues are cut from models, the finishing being done by the sculptor or under his supervision. It cannot be assumed that Congress intended to exclude bronze statuary from the benefits of this paragraph. Indeed, the exact contrary is to be presumed, otherwise nothing would have been said regarding metal statuary. Congress must have had bronze statuary in mind and the manner in which it was made when it used the language in question. If bronze statuary, which is the metal chiefly used in the art, be not included it is difficult to understand to what the language applies."

In the case at bar the Board of Appraisers say:

> "We do not think it is shown that this method of producing bronze or metal statues

> by hand has been very extensively used; still we are of the opinion, in view of the ease with which commercial bronze statuary may be produced by the hand of a skilled artisan entirely independent of the artist, that it was intended to prohibit the importation under said paragraph 454 of such pieces of casting, *thereby protecting the bronze foundaries and the domestic industries, where great quantities of labor are employed and large capital is invested.*"

It would seem that a subject upon which such conflicting decisions have been made is not one which is "so frivolous as not to need further argument." We cannot in this memorandum review the evidence or enter into any protracted discussion of the matters involved in this appeal, but we think the most cursory examination of the record will show that there is a substantial question here which has never been passed upon by this court and as to which the taxpayers are entitled to be heard.

III.

THE MOTION TO DISMISS OR AFFIRM SHOULD BE DENIED OR THE DECISION OF IT SHOULD BE POSTPONED UNTIL AFTER THE HEARING ON THE MERITS.

Dated, New York, May 3rd, 1910.

W. WICKHAM SMITH,
JOHN K. MAXWELL,
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W. WICKHAM SMITH,
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In the Supreme Court of the United States.

OCTOBER TERM, 1911.

B. ALTMAN & CO., APPELLANTS AND plaintiffs in error,
v.
THE UNITED STATES.
} No. 208.

APPEAL FROM AND IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is a direct appeal and writ of error to review a judgment of the Circuit Court for the Southern District of New York, affirming a decision of the Board of General Appraisers, which sustained an assessment of duties by the collector of customs at the port of New York on an importation of a bronze bust by B. Altman & Co.

The merchandise was imported from France. The collector classified it under paragraph 193 of the tariff act of July 24, 1897, c. 11 (30 Stat., 151, 167), which imposed 45 per cent ad valorem on "articles or wares

not specially provided for in this act, composed wholly or in part of * * * metal, and whether partly or wholly manufactured * * *." (R., 7.)

The importer protested, contending for classification as "statuary" under the reciprocal commercial agreement with France, *infra*, negotiated under section 3 of the tariff act of 1897, *infra*, authorizing the negotiation of such agreements with reference, among other articles, to "Paintings in oil or water colors, pastels, pen and ink drawings, and *statuary*." (R., 6, 7.)

The Board of General Appraisers found that the bust had been cast in a foundry by artisans from a model made by an artist, and that "practically all the handwork upon it was done by the artisan at the foundry, which handwork consists of removing seams and protuberances left by the imperfections of the mold, and perhaps chasing or smoothing the surface of the figure, which in no way change the form," and overruled the protest on the authority of *Tiffany* v. *United States* (71 Fed., 691) and *Richard* v. *United States* (158 Fed., 1019). (R., 58, 59.)

The Circuit Court affirmed, without opinion, the decision of the board. (R., 64.)

Consideration of a motion to dismiss or affirm was postponed by this court until the hearing of the case.

The assignments of error allege, in addition to the claim in the protest under section 3 of the tariff act of 1897 and the reciprocal commercial agreement with France, that the bust is dutiable under paragraph

454 of said act (30 Stat., 194), imposing the rate of 20 per cent ad valorem on "such statuary as is cut, carved, or otherwise wrought by hand from a solid block or mass of marble, stone, or alabaster, or from metal, and as is the professional production of a statuary or sculptor only." This contention, however, is expressly abandoned in appellant's brief (p. 14).

The question presented is accordingly whether this merchandise, concededly not statuary as defined in paragraph 454 of the act of 1897, is dutiable at 15 per cent ad valorem, under section 3 of that act and the commercial agreement with France, or at 45 per cent ad valorem, the rate assessed by the collector, and sustained by the Board of General Appraisers and the Circuit Court.

The Government maintains—

That this court has no jurisdiction of the appeal in any view of the case;

That a reciprocal commercial agreement under section 3 of the tariff act of 1897 is not a treaty within the meaning of the Constitution of the United States and section 5 of the judiciary act of March 3, 1891, c. 517 (26 Stat., 826–828); therefore this court is without jurisdiction to review the judgment of the Circuit Court;

That as such agreements can not legally extend the scope of the law, the agreement with France can not be construed to embrace statuary not covered by said section 3; and

That the merchandise in suit, not being wrought by hand from metal and the professional production of a statuary or sculptor only, is excluded from the operation of section 3 by the express limitation in paragraph 454 of the same act that—

> * * * the term "statuary" *as used in this act* shall be understood to include only such statuary as is cut, carved, or otherwise wrought by hand from a solid block or mass of marble, stone, or alabaster, or from metal, and as is the professional production of a statuary or sculptor only.

The pertinent provisions of section 3 of the act of 1897 and of the commercial agreement with France are as follows:

Section 3, tariff act of July 24, 1897, c. 11 (30 Stat., 151, 203, 204):

> That for the purpose of equalizing the trade of the United States with foreign countries, and their colonies, producing and exporting to this country the following articles: Argols, or crude tartar, or wine lees, crude; brandies, or other spirits manufactured or distilled from grain or other materials; champagne and all other sparkling wines; still wines, and vermuth; paintings and statuary; or any of them, the President be, and he is hereby, authorized, as soon as may be after the passage of this act, and from time to time thereafter, to enter into negotiations with the Governments of those countries exporting to the United States the above-mentioned articles, or any of them,

with a view to the arrangement of commercial agreements in which reciprocal and equivalent concessions may be secured in favor of the products and manufactures of the United States; and whenever the Government of any country, or colony, producing and exporting to the United States the above-mentioned articles, or any of them, shall enter into a commercial agreement with the United States, or make concessions in favor of the products, or manufactures thereof, which, in the judgment of the President, shall be reciprocal and equivalent, he shall be, and he is hereby, authorized and empowered to suspend, during the time of such agreement or concession, by proclamation to that effect, the imposition and collection of the duties mentioned in this act, on such article or articles so exported to the United States from such country or colony, and thereupon and thereafter the duties levied, collected, and paid upon such article or articles shall be as follows, namely:

* * * * *

Paintings in oil or water colors, pastels, pen-and-ink drawings, and statuary, fifteen per centum ad valorem.

The President shall have power, and it shall be his duty, whenever he shall be satisfied that any such agreement in this section mentioned is not being fully executed by the Government with which it shall have been made, to revoke such suspension and notify such Government thereof.

And it is further provided that, with a view to secure reciprocal trade with countries pro-

ducing the following articles, whenever and so often as the President shall be satisfied that the Government of any country, or colony of such Government, producing and exporting, directly or indirectly, to the United States coffee, tea, and tonquin, tonqua, or tonka beans, and vanilla beans, or any of such articles, imposes duties or other exactions upon the agricultural, manufactured, or other products of the United States, which, in view of the introduction of such coffee, tea, and tonquin tonqua, or tonka beans, and vanilla beans, into the United States, as in this act hereinbefore provided for, he may deem to be reciprocally unequal and unreasonable, he shall have the power and it shall be his duty to suspend, by proclamation to that effect, the provisions of this act relating to the free introduction of such coffee, tea, and tonquin, tonqua, or tonka beans, and vanilla beans, of the products of such country or colony, for such time as he shall deem just; and in such case and during such suspension duties shall be levied, collected, and paid upon coffee, tea, and tonquin, tonqua, or tonka beans, and vanilla beans, the products or exports, direct or indirect, from such designated country, as follows:

On coffee, three cents per pound.

On tea, ten cents per pound.

On tonquin, tonqua, or tonka beans, fifty cents per pound; vanilla beans, two dollars per pound; vanilla beans commercially known as cuts, one dollar per pound.

Reciprocal commercial agreement with France ("Treaties, Conventions, International Acts, Protocols, and Agreements," Senate Document No. 357, 61st Cong., 2d sess., p. 543):

* * * * *

II.

It is reciprocally agreed on the part of the United States, in accordance with the provisions of section 3 of the United States tariff act of 1897, that during the continuance in force of this agreement the following articles of commerce, the product of the soil or industry of France, shall be admitted into the United States at rates of duty not exceeding the following, to wit:

* * * * *

On paintings in oil or water colors, pastels, pen-and-ink drawings, and statuary, fifteen per centum ad valorem.

ARGUMENT.

I.

No question is presented of which this court has jurisdiction upon direct appeal from the Circuit Court.

It is elementary that the sovereign is not suable in its own courts without its expressed consent. This is a suit against the United States, and it is regulated in all its incidents by acts of Congress; so far as the statutes go such suits proceed, and no further. Hence general acts do not apply to the

sovereign unless the sovereign be mentioned therein. (*Cheatham* v. *United States*, 92 U. S., 85, 88, 89.)

The act of June 10, 1890, with its several amendments, has been held uniformly to establish and limit the scope of every remedy by which disputes between the Government and its citizens as to duties on imports shall be settled.

That act provided an elaborate and complete system as well for trials as appeals in this class of cases.

Until the establishment of the circuit courts of appeals, an appeal from the Board of General Appraisers lay, for either party to the litigation, to the circuit court, where new evidence might be considered. On the entire record then the circuit court was empowered to determine the questions of law and fact involved; and the decision of said court was declared to be final unless (so far as the importer was concerned) the court should certify that the question was of such importance as to require a decision by the Supreme Court, in which event the importer could by appeal bring the record here. (Act of June 10, 1890, sec. 15, c. 407; 26 Stat., 131, 138.)

These provisions remained in force until the judiciary act of March 3, 1891, c. 517 (26 Stat., 826), whereby, impliedly, at least, the provision for appeal to this court was repealed by section 6 (p. 828), prescribing that circuit courts of appeals should be final in all cases arising under the revenue laws; and

gave that court power to certify questions to this court.

This implied amendment of section 15 of the act of 1890 was carried into that section by the act of May 27, 1908, c. 205 (35 Stat., 403–405).

Undeniably Congress had power to thus limit further procedure in customs cases. In fact, it has gone still further in creating in the tariff act of 1909 a Customs Court, the decisions of which are apparently made irreviewable regardless of whether they relate to the validity or construction of any treaty, or even the constitutionality of customs laws. (The Judicial Code, sec. 195.)

The appeal now at bar was taken July 2, 1909. (R. 66.)

The appellants seem to have thought they were acting under the original act of June 10, 1890, for we find on page 66 of the record a certificate of the Circuit Court to the effect that the questions ought to be reviewed here.

A comparison of their brief with the record indicates that they are also uncertain whether they are prosecuting an appeal or a writ of error. In any case, however, there is no statutory warrant for bringing the record here directly from the Circuit Court. The act of March 3, 1891, is dealing with general, not special, jurisdiction. Revenue cases are particularly mentioned in section 6, but not in section 5, on which this appeal depends, nor in any other part of the act. A change looking to the ordi-

dinary business of the courts should not be held to embrace a change in special jurisdiction merely on the strength of words general enough to include it, when it appears that the general policy of the special jurisdiction still is maintained. The language just used is found in the opinion of this court in *Reid* v. *United States* (211 U. S., 529, 538).

Our position is that, granting that the judiciary act of 1891 allowed direct appeal from circuit courts as to treaty questions coming before the Board of General Appraisers, in customs controversies, that right was taken away by said act of 1908. Owing to abuses that developed in connection with appellate procedure in cases decided by the Board of Appraisers under the customs administrative act of June 10, 1890, sec. 15, supra, the procedure was modified by said act of 1908. Among the changes made (sec. 2) was the elimination of the right to take further evidence at circuit and the introduction of a provision that, as against the importers:

> The decision of such circuit court shall be final, * * * unless such court shall be of the opinion that the question involved is of such importance as to require a review of such decision *by the Circuit Court of Appeals* of the United States within the circuit in which the matter arises, in which case said circuit court or the judge making the decision may, within thirty days thereafter, allow an appeal to said Circuit Court of Appeals. * * * The decision of such Circuit Court of Appeals may be reviewed by the Supreme Court of the United

> States in any of the ways provided in cases arising under the revenue laws by the act approved March third, eighteen hundred and ninety-one. * * *

The above-quoted explicit and unqualified provision in said act of 1908 limited appeals from Circuit Courts to Circuit Courts of Appeals, and provided for review by the Supreme Court only in cases previously decided by Circuit Courts of Appeals. This provision is inconsistent with that in section 5 of the judiciary act of 1891, relative to treaties, which is the basis of the importers' appeal in the present cause. For this reason the provisions of the act of 1908 control, in accordance with section 4 of said act, reading as follows:

> SEC. 4. That all laws and parts of laws inconsistent with this act are hereby repealed.

Assuming, but not admitting, that section 5 of the judiciary act of March 3, 1891, *supra*, applies to suits in which the United States is defendant under the act of June 10, 1890, *supra*, then in order that this court may have jurisdiction, the record in this case must show that a real and substantial dispute exists over the construction of the Constitution of the United States, or the validity or construction of a treaty made under its authority.

Cincinnati, etc., R. Co. v. *Thiebaud*, 177 U. S., 615, 619, 620.

Western Union Telegraph Co. v. *Ann Arbor R. Co.*, 178 U. S., 239, 243, 244.

Lampasas v. *Bell*, 180 U. S., 276, 282, 283.

American Sugar Refining Co. v. *New Orleans*, 181 U. S., 277, 281.
Spencer v. *Duplan Silk Co.*, 191 U. S., 526, 530.

No such dispute or controversy exists here. The only real, substantial question raised or involved is whether the collector misconstrued the statute, and that gives this court no jurisdiction upon a direct writ of error or appeal. Nothing is here in question except an act of Congress, which in substance establishes one rate of duty on certain imported merchandise until the happening of certain contingencies, and thereafter a different rate. A decision involving the proper construction of that act *after* the happening of the named contingencies can no more present a question on the construction of a treaty than if made *before* such event. Assume *arguendo* that the named contingency were the negotiation of a treaty in the constitutional sense; still the only question that could then arise would be the fact of negotiation; in other words, its validity; which question is laid wholly out of the case at bar. For, continuing the assumption, if the treaty when negotiated went beyond the statute, it could not affect the statute, but could only become operative by means of new legislation. And if such treaty does follow the authority conferred by statute, then a court in considering the situation has to find, first, whether the treaty in fact became operative; and, if that be found so, the entire consideration must shift at once to the statute, on an inquiry as to the proper meaning and construction of

the act which was made effective by the happening of the condition subsequent.

American Sugar Refining Co. v. *United States*, 211 U. S., 155, 161, 162.

Shaw v. *United States*, 212 U. S., 559, 560.

A claim of jurisdiction is accordingly unwarranted by the record.

It is, moreover, unsupported by the law. The commercial agreement is a treaty neither in name nor in essence. In a broad sense perhaps all treaties are agreements or contracts, the word "agreement" being sufficiently comprehensive to embrace all forms of stipulation, written or verbal, and relating to all kinds of subjects. (*Virginia* v. *Tennessee*, 148 U. S., 503, 517, 518.)

But the converse is not true that all agreements or contracts are treaties. "Treaty" is a word of superior dignity; "agreement" is not to be taken as generic, but as comprehending only what is inferior. In other words, "treaty" has become a technical term for a class of so high a grade that all else is inferior in classification and in enumeration to it. Moreover, it is more specific and limited than "agreement." The inferior, accordingly, under well-established rules, should not be held to include the superior; nor the general term held to enlarge a specific and limited designation.

But be that as it may, the general meaning of the word "agreement" can not control this case. The question on which appellants depend is whether or not *this particular agreement is a treaty within the*

meaning of the Constitution and of the judiciary act of 1891, which follows the Constitution. The answer must be in the negative, assuming the court shall find it necessary to proceed so far with the several contentions made. This appears by several considerations.

1. By constitutional limitations upon the States.

Article 1, section 10, clause 1, provides that—

> No State shall enter into any *treaty*, alliance, or confederation, * * *.

Article 1, section 10, clause 3, provides that—

> No State shall, without the consent of Congress, * * * enter into any *agreement* or compact with another State, or with a foreign power, * * *.

The two terms accordingly stand for different things. The former are absolutely forbidden; the latter allowed with the assent of Congress. This court has made that clear. (*Holmes* v. *Jennison*, 14 Pet., 540, 570, 571.)

Mr. Chief Justice Taney, speaking for the court, there said:

> In expounding the Constitution of the United States every word must have its due force and appropriate meaning; * * *. Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood. No word in the instrument, therefore, can be rejected as superfluous or unmeaning, and this principle of construction applies with peculiar force to the two clauses of the tenth section of the first

> article, of which we are now speaking, because the whole of this short section is directed to the same subject; that is to say, it is employed altogether in enumerating the rights surrendered by the States; and this is done with so much clearness and brevity that we can not for a moment believe that a single superfluous word was used or words which meant merely the same thing. When, therefore, the second clause declares that no State shall enter into "any agreement or compact" with a foreign power, without the assent of Congress, the words "agreement" and "compact" can not be construed as synonymous with one another; and still less can either of them be held to mean the same thing with the word "treaty" in the preceding clause, into which the States are positively and unconditionally forbidden to enter, and which even the consent of Congress could not authorize.

2. By the distinction between a treaty and an act of Congress.

Article VI, clause 2, of the Constitution provides:

> This Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land.

In this country a treaty is something more than a contract, for the Federal Constitution declares it to be the law of the land.

Haver v. *Yaker*, 9 Wall., 32, 35.
Head Money Cases, 112 U. S., 580, 598.
United States v. *Rauscher*, 119 U. S., 407, 419.

The commercial agreement was not a law; the law was section 3 of the tariff act of 1897. The agreement could legally add nothing to that.

United States v. *Wile*, 130 Fed., 331, 332, C. C. A.

Richard v. *United States*, 151 Fed., 954, 955, C. C.; 158 Fed., 1019, C. C. A.

Upon its proclamation one rate of duty was substituted for another, the latter being "suspended" by the law during the continuance of the agreement. "Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency." (*Field* v. *Clark*, 143 U. S., 649, 693.)

The President did not fix the rate of duty nor limit the merchandise to be imported; Congress alone could do that. He acted merely as agent of the law-making department, his function being to carry out the will of the Congress as expressed in the law. (*Field* v. *Clark*, *supra*.)

Authority to ascertain and declare the event or state of things upon which a law shall take effect may be constitutionally delegated to the President, but he is restricted to that. No legislative power can be delegated.

Field v. *Clark*, *supra*, pp. 682, 692–694.

Brig Aurora, 7 Cranch, 382, 388.

It is different with treaties. They are made by the President by and with the advice and consent of the Senate. Concurrence of two-thirds of the Senators

present is essential. The language of the Constitution (art. 2, sec. 2, cl. 2) is:

> He shall have power, by and with the advice and consent of the Senate, to make treaties provided two-thirds of the Senators present concur.

It is utterly incompatible with the Constitution to regard an agreement under section 3 of the tariff act of 1897 as a treaty upon the theory that the legislative assent was signified in advance rather than after negotiation, when such assent is implied from a MAJORITY *vote, as in the case of the tariff act of 1897.* The vote in the Senate stood: Yeas 38, nays 28, not voting 23. (Cong. Rec., 55th Cong., 1st sess., vol. 30, pt. 3, p. 2447.) *That is less than "two-thirds of the Senators present."*

The decisions of this court, cited in appellants' brief (pp. 33, 34), concerning the assent of Congress to agreements between States of the United States, or between States and foreign countries, are not at all in point. As therein stated, the Constitution (*supra*) makes no provision as to the mode or form in which the consent of Congress is to be signified in such cases. As further stated by the court, it is a matter left to the wisdom of that body, to be decided according to the ordinary rules of law and of right reason. It is not so with treaties; the Constitution makes definite provision as to them, to wit, that two-thirds of the Senators present shall concur. Nothing short of this will suffice to signify the requisite consent.

This is forcefully expressed in a special message by President Washington upon the Jay treaty of 1795:

> Having been a member of the General Convention, and knowing the principles on which the Constitution was formed, I have ever entertained but one opinion on this subject; and from the first establishment of the Government to this moment my conduct has exemplified that opinion—that the power of making treaties is exclusively vested in the President, by and with the advice and consent of the Senate, provided two-thirds of the Senators present concur; and that every treaty so made and promulgated thenceforward became the law of the land. It is thus that the treaty-making power has been understood by foreign nations, * * *. (2 Whart. Inter. Law Dig., sec. 131a; 1 Messages and Papers of the Presidents, 195.)

This court has repeatedly said that the constitutional treaty is one thus made by the President and the Senate.

> *Head Money Cases*, 112 U. S., 580, 599.
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> *New York Indians.* v. *United States*, 170 U. S., 1, 23.
>
> *De Lima* v. *Bidwell*, 182 U. S., 1, 194, 195.
>
> *Fourteen Diamond Rings* v. *United States*, 183 U. S., 176, 183.

In the last-cited case a resolution adopted by the Senate by less than two-thirds of a quorum was declared (p. 180) absolutely without legal significance in respect to the intention of the Senate in the ratification of the treaty of peace with Spain.

Cotzhausen v. *Nazro* (107 U. S., 215, 217), cited by appellants (Br., 31), did not decide that a treaty within the meaning of the Constitution may be made without the concurrence of two-thirds of the Senators present. The question was whether dutiable goods could lawfully be imported in the foreign mail. Reference was made to the treaty of Berne, of October 9, 1874 (19 Stat., 577, 604), establishing the international postal system, as "the law of the land," but the question whether or not it was a treaty in the constitutional sense was not in issue and therefore not decided.

That so-called treaty and many postal "conventions" were negotiated under the several statutes enacted prior to the revision of the laws in 1873 and under section 398 of the Revised Statutes, providing:

> For the purpose of making better postal arrangements with foreign countries, or to counteract their adverse measures affecting our postal intercourse with them, the Postmaster General, by and with the advice and consent of the President, may negotiate and conclude postal treaties or conventions, and may reduce or increase the rates of postage on mail matter conveyed between the United States and foreign countries.

The word "treaties" is there inaccurately used. This is evidenced by the fact that section 4012 of the Revised Statutes authorizes the Postmaster General, "*by and with the advice and consent of the President,*" to make certain postal *arrangements*. Both sections

398 and 4012 were taken from the act of June 8, 1872, c. 335 (17 Stat., 283, 304, 316, 317), the former being section 167 and the latter section 273 of that act.

This is clearly a case for application of the rule that where inapt, inaccurate, or improper terms are used in a statute they should be interpreted according to that meaning which the legislature actually intended to express, although this may involve a departure from their literal signification.

The improper use of terms is not uncommon in legislation. A notable instance may be found in section 1955 of the Revised Statutes, *where "exportation" to Alaska from any port in the United States* is spoken of. There can be no doubt that the word "exportation" was there irregularly used and should not be deemed a legislative interpretation or use extending it to shipments which are not exportations within the meaning of the Constitution. This court has many times held that the words "export" and "import" relate only to shipments between foreign countries and the United States.

Faber v. *United States*, 221 U. S., 649, 659.
Woodruff v. *Parham*, 8 Wall., 123, 131, *et seq.*
Brown v. *Houston*, 114 U. S., 622, 628, *et seq.*
Fairbank v. *United States*, 181 U. S., 283, 294.
De Lima v. *Bidwell*, 182 U. S., 1, 176.
Dooley v. *United States*, 183 U. S., 151, 154, 155.
Pittsburg & S. Coal Co. v. *Louisiana*, 156 U. S., 590, 600.
Patapsco Guano Co. v. *North Carolina Board*, 171 U. S., 345, 350.

A case showing the extent to which the foregoing rule is applied is *Burt* v. *Rattle* (31 Ohio, 116, 130). The statute there spoke of "preferred stockholders" in a corporation and of the payment to them of "dividends." To give effect to the law, the court held that "preferred stockholders" must be read "mortgage creditors" and "dividends" must be read "interest." It was said:

> A mortgage creditor, although denominated a "preferred stockholder," is a mortgage creditor nevertheless; and interest is not changed into a "dividend" by calling it a dividend. Nothing is more common in the construction of statutes and contracts than for the court to correct such self-evident misnomers by supplying the proper words.

If the meaning of a term appearing in the Constitution is not enlarged by its misuse in acts of Congress *a fortiori* it can not be enlarged by incidental and improper use by executive officers, or by courts, in cases not involving its interpretation. Hence the sporadic use of "treaty" and "arrangement" in lieu of the word "agreement," ordinarily used, in decisions of the Treasury Department, of the Board of General Appraisers, and of courts cited in appellants' brief at pages 32 and 33, does not change the legal status of commercial agreements negotiated under section 3 of said act. Those decisions were not interpretative of the term. One not cited was, to wit, *In re Havemeyer* (T. D. 24247, G. A. 5286, of 1903), where the Board of General Appraisers specifically held that a commercial agreement negotiated under said section

is not a treaty and that the term "statuary," as therein used, has reference only to such statuary as is defined by the act in paragraph 454.

The commercial agreement with France was negotiated as an agreement and not as a treaty. The word "treaty" nowhere appears, but the word "agreement" is frequently used. The certificate of the Secretary of State (appellants' brief, p. 5), furthermore, refers to it as a "reciprocal commercial agreement."

3. By implied legislative declaration in the very act under discussion that agreements of the sort mentioned in section 3 are not treaties.

Section 3 of the tariff act of 1897 provided for the former; section 4 of the same act for the latter. Juxtaposition of the two sections and repeated use of the two terms "agreements" and "treaties," with careful distinction and recognition of the constitutional requirement that the latter should be "by and with the advice and consent of the Senate," exclude the idea that the two terms were used interchangeably or that the former was used in a comprehensive sense to include the latter. Section 4 (30 Stat., 204, 205) provided as follows:

> That whenever the President of the United States, by and with the advice and consent of the Senate, with a view to secure reciprocal trade with foreign countries, shall, within the period of two years from and after the passage of this act, enter into commercial treaty or treaties with any other country or coun-

tries concerning the admission into any such country or countries of the goods, wares, and merchandise of the United States and their use and disposition therein, deemed to be for the interests of the United States, and in such treaty or treaties, in consideration of the advantages accruing to the United States therefrom shall provide for the reduction during a specified period, not exceeding five years, of the duties imposed by this act, to the extent of not more than twenty per centum thereof, upon such goods, wares, or merchandise as may be designated therein of the country or countries with which such treaty or treaties shall be made as in this section provided for; or shall provide for the transfer during such period from the dutiable list of this act to the free list thereof of such goods, wares, and merchandise, being the natural products of such foreign country or countries and not of the United States; or shall provide for the retention upon the free list of this act during a specified period, not exceeding five years, of such goods, wares, and merchandise now included in said free list as may be designated therein; and when any such treaty shall have been duly ratified by the Senate and approved by Congress, and public proclamation made accordingly, then and thereafter the duties which shall be collected by the United States upon any of the designated goods, wares, and merchandise from the foreign country with which such treaty has been made shall, during the period provided for, be the duties specified and provided for in such treaty, and none other.

The language of section 3 indicates that the formalities customary in the negotiation of treaties were unnecessary to give effect to its provisions. The section authorized the President—

> * * * to enter into negotiations with the governments of those countries exporting to the United States the above-mentioned articles, or any of them, with a view to the arrangement of commercial agreements in which *reciprocal and equivalent concessions may be secured in favor of the products and manufactures of the United States;*

And provided that—

> * * * whenever the government of any country, or colony, producing and exporting to the United States the above-mentioned articles, or any of them, *shall enter into a commercial agreement with the United States, or make concessions in favor of the products, or manufactures thereof, which, in the judgment of the President, shall be reciprocal and equivalent, he shall be, and he is hereby, authorized and empowered to suspend, during the time of such agreement or concession, by proclamation to that effect, the imposition and collection of the duties mentioned in this act, on such article or articles so exported to the United States from such country or colony, and thereupon and thereafter the duties levied, collected, and paid upon such article or articles shall be as follows:* * * *

The concession might be made known in any way satisfactory to the President; a formal written docu-

ment was unnecessary. His proclamation could be issued upon information that the foreign country had made a reciprocal and equivalent concession, the same as it might have been issued under the provisions relating to coffee, tea, and beans in the latter part of section 3 and as it actually was issued under a similar enactment in section 3 of the tariff act of 1890, which appellants' counsel admit (Br. 36) did not relate to treaties.

Both "agreement" and "concession," as far as the President is concerned, had reference only to merchandise imported into the foreign country from the United States. The law designated the articles that might be im- orted into the United States from the foreign country and specified the duty to be collected in lieu of the ordinary rates, expressly suspended. The President could not add to the articles nor change the rates of duty. Congress left neither to his discretion.

Section 4 of the tariff act of 1897, on the other hand, gave the President full discretion in the matter of the kinds of merchandise to be admitted into the United States and a limited discretion as to the rates of duty to be imposed thereon, and expressly required the negotiation of *treaties* to accomplish the purpose in view. The consent of the Senate and the approval of Congress were expressly required before the President could make proclamation of the new rates.

II.

The word "statuary" means the same in section 3 as in paragraph 454 of the tariff act of 1897.

This is plainly shown by the language of paragraph 454, which provides:

> Paintings in oil or water colors, pastels, pen and ink drawings, and statuary, not specially provided for in this act, twenty per centum ad valorem; but the term "statuary" as used in this act shall be understood to include only such statuary as is cut, carved, or otherwise wrought by hand from a solid block or mass of marble, stone, or alabaster, or from metal, and as is the professional production of a statuary or sculptor only.

The words of limitation are not "as used *in section one* of this act," or "as used *in sections one and two* of this act," but "as used *in this act*." Section 3 is as much a part of "this act" as section 1, containing the paragraphs imposing duties, or as section 2, consisting of the free list. The intention to make the limitation coextensive with the entire tariff act could not be expressed in clearer or more apt words.

The commercial agreement could not enlarge or extend the scope of section 3. The President was allowed no latitude in its negotiation beyond what was set forth in that section, and, therefore, could not extend the privileges therein conferred. But there was no intention to do that. The agreement followed the terms of section 3 and could not properly have been understood by either of the contracting parties

to comprehend more than the law granted. Anything more would have transcended the authority conferred by the law and been void.

The commercial agreement with France states (Art. II) that—

> It is reciprocally agreed on the part of the United States *in accordance with the provisions of section 3* of the United States tariff act of 1897. * * *

Examination of section 3 was necessary to ascertain the scope of the agreement. The law authorized the President "to suspend * * * the imposition and collection of the duties mentioned in this act, on such article or articles so exported to the United States from such country or colony," and provided that "thereupon and thereafter the duties levied, collected, and paid upon such article or articles shall be as follows * * *."

The question arose what rate of duty was suspended by section 3 on statuary? Statuary was provided for *eo nomine* in paragraph 454 of section 1 and in paragraph 649 of section 2 of the tariff act of 1897. Paragraph 649 by its terms was restricted to importations solely for—

> Religious, philosophical, educational, scientific, or literary purposes, or for the encouragement of the fine arts, or for the use and by order of any college, academy, school, or seminary of learning in the United States, or any State or public library, and not for sale.

This paragraph was obviously inapplicable. "The duties mentioned in this act," which were suspended by the President's proclamation, pursuant to section 3, must then have been the duties imposed in paragraph 454, and the words "such article" must refer to statuary as defined in that paragraph. In other words, section 3 merely substituted "15" for "20" per centum ad valorem as the duty on statuary of the kind described in paragraph 454, when imported from France or other country having a commercial agreement with the United States. This completely distinguishes *New York Indians* v. *United States* (170 U. S., 1, 23) cited by appellants. (Br., 40.)

The courts have passed upon these matters. In *Nicholas* v. *United States* (122 Fed., 892, 893) the Circuit Court for the Southern District of New York held "liqueurs" to be included in the phrase "brandies, or other spirits," because the law was so construed and expression given thereto by the representatives of the two countries in the copy of the agreement signed by them. The same conclusion was reached upon different grounds by the Circuit Court of Appeals for the Second Circuit in *United States* v. *Wile* (130 Fed., 331, 332), *wherein it was declared that the Government's contention that the agreement cannot legally extend the scope of section 3 "is undoubtedly sound."*

This was redeclared in a case in which the question here in issue was litigated. (*Richard* v. *United States*, 151 Fed., 954, 955; 158 Fed., 1019.)

The circuit court said:

> It was remarked in United States *v.* Wile (130 Fed., 331; 64 C. C. A., 577), that a "commercial agreement can not legally extend the scope of section 3 of the tariff act" (of 1897). The agreement there considered was with France, but the Italian agreement is entirely similar; *and it can not change the definition of "statuary" contained in paragraph 454, nor does it purport so to do.*
>
> In the *Wile case, supra*, the court found two categories to which the article under consideration could be referred—one general and one specific. The agreement with France modified the duty upon all articles in the general category, and that necessarily contained and controlled the more specific description. Such is not the case here. Statuary is mentioned in and defined by paragraph 454 only, *and the word must mean the same thing in section 3 as it does in paragraph 454 of the same statute, and such signification is not and can not be varied by the commercial agreement above referred to.*

The Circuit Court of Appeals, Second Circuit, affirmed the decision of the Circuit Court "per curiam."

The rule that an *eo nomine* provision in a tariff act includes everything known by the particular name has no application here. Congress has expressly limited the word "statuary" wherever it appears in the tariff act of 1897 to "such statuary as is cut, carved, or otherwise wrought by hand from

a solid block or mass of marble, stone, or alabaster, or from metal, and as is the professional production of a statuary or sculptor only." That is conclusive.

Moreover, the rule that the same words occurring in different parts of a statute are to be taken in the same sense would require the limitation of "statuary" in section 3 as in paragraphs 454 and 649. This rule is especially applicable to revenue laws.

Thus the word "exportation" has been held to be used in statutes relating to drawback, as in other customs laws, to mean a shipment with intent to land abroad and therefore inapplicable to merchandise consumed on board of a vessel, although its primary meaning is to carry or send out of a place.

> *Swan & Finch Co.* v. *United States*, 190 U. S., 143, 145, 146.
>
> 17 Opin. Atty. Gen., 579; 21 *id.*, 501; 23 *id.*, 418.

And birds have been held not to be "animals" under a tariff act providing for "horses, mules, cattle, sheep, hogs, and other live animals," because they were excluded from a provision for "animals of all kinds" in a prior statute. (*Reiche* v. *Smythe*, 13 Wall., 162, 165.)

Mr. Justice Davis, delivering the opinion of the court, there said:

> Congress having, therefore, defined the word in one act, so as to limit its application, how can it be contended that the definition shall be enlarged in the next act on the same subject, when there is no language used indicating an

> intention to produce such a result? Both acts are *in pari materia*, and it will be presumed that if the same word be used in both, and a special meaning were given it in the first act, that it was intended it should receive the same interpretation in the latter act, in the absence of anything to show a contrary intention.

Appellants' further contention that statuary is "specially provided for" in section 3, and therefore is not subject to the definition in paragraph 454, is inconsistent with and refuted by the contention that the word is there used in its general sense as including all kinds of statuary however and by whomever made. The phrase "not specially provided for" is frequently used in tariff acts, and contemplates, as the word "specially" naturally implies, more specific provision elsewhere for articles which would otherwise be covered by the general term. But irrespective of that the express limitation in paragraph 454 must control classification under all sections in which provision is made for statuary by that name.

Appellants do not argue that the word "statuary" as used in section 3 includes not only the merchandise specified in paragraph 454 of the act and also merchandise referable to other paragraphs and schedules thereof. They contend, without logical support, as we think, that section 3 reenumerates merchandise other than such as is included within any of the paragraphs fixing rates. This argument we have answered already; but here we point out that a claim of the sort we have just suggested can not be supported.

For if Congress had intended by the use of the word "statuary" in section 3 to designate not only the sort of thing included in paragraph 454, but also something which was otherwise denominated or intended in some other paragraph, then the presumption is unusually strong that something would have been said to indicate such intention, or at least that the word would not have been used in section 3 in such close association with the remaining articles included in paragraph 454.

Wherefore the United States prays that this appeal and writ of error be dismissed; or if the court be of opinion that the appeal is authorized by law, then that the judgment appealed from be affirmed.

WILLIAM L. WEMPLE,
Assistant Attorney General.
CHARLES E. MCNABB,
Assistant Attorney.
FRANK L. LAWRENCE,
Special Attorney.

APRIL, 1912.

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In the Supreme Court of the United States.

OCTOBER TERM, 1909.

B. ALTMAN & CO., PLAINTIFFS IN ERROR,
v.
THE UNITED STATES.
No. 792.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION TO DISMISS OR AFFIRM.

Now comes the Solicitor-General on behalf of the United States and moves the court—

1. That the writ of error be dismissed for want of jurisdiction in this court, because the case presents neither a real and substantial constitutional question nor a question concerning the validity or construction of a treaty.

2. In the alternative, that the judgment of the Circuit Court be affirmed because the question involved is so frivolous as not to need further argument.

STATEMENT.

This is a direct writ of error to review a decree of the Circuit Court for the Southern District of New York affirming a decision of the Board of General

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Appraisers, which sustained an assessment of duties by the collector of customs at the port of New York on an importation of a bronze bust by B. Altman & Co.

The merchandise was imported from France. The collector classified it under paragraph 193 of the tariff act of 1897, which imposed 45 per cent ad valorem on "articles or wares not specially provided for in this act, composed wholly or in part of * * * metal, and whether partly or wholly manufactured * * *." (R. 7.)

The importer protested, contending for classification as "statuary" under the reciprocal commercial agreement with France (30 Stat., 1774; T. D., 19405) negotiated under section 3 of the tariff act of 1897, which authorized the negotiation of such agreements with reference, among other articles, to "paintings in oil or water colors, pastels, pen and ink drawings, and *statuary*." (R. 6.)

The Board of General Appraisers found that the bust had been cast in a foundry by artisans from a model made by an artist, and that the artist had done little or no retouching on the metal casting, and overruled the protest on the authority of *Richard* v. *United States* (158 Fed., 1019) and *Tiffany* v. *United States* (71 Fed., 691; R. 57–60.)

No record or briefs were printed in the Circuit Court, which affirmed, without opinion, the decision of the board. (R. 64.)

In *Richard* v. *United States*, *supra*, the Circuit Court of Appeals for the Second Circuit held that the provision concerning "statuary" in section 3, tariff act of 1897, and in the reciprocal commercial agreements negotiated under said section, is subject to paragraph 454 of said act prescribing that—

> * * * the term "statuary" as used in this act shall be understood to include only such statuary as is cut, carved, or otherwise wrought by hand from a solid block or mass of marble, stone, or alabaster, or from metal.

The plaintiff assigns the following errors: (R.66,67.)

1. In not holding that the commercial agreement between the United States and France, as proclaimed by the President of the United States (T. D., 19405) was to be in full scope according to its language without being in any way restricted or modified by the definition contained in paragraph 454, section 1, of the tariff act of July 24, 1897, but not embodied either in the commercial agreement itself or in the President's proclamation thereof.

2. In not holding that the term "statuary" as used in section 3 of the tariff act and in the said commercial agreement with France or the President's proclamation thereof, was not subject to the definition contained in paragraph 454, Schedule N, section 1, of said tariff act.

3. In not holding the merchandise dutiable at 15 per cent ad valorem under section 3 of the tariff act and the commercial agreement with France and the President's proclamation thereof.

4. In holding that statuary which is substantially made by casting is not wrought from metal, though it may be afterwards surface finished by the artist.

5. In not holding that the article in question was an article wrought from metal, the production of a professional statuary or sculptor and a piece of statuary.

6. In not holding the merchandise dutiable at 20 per cent under paragraph 454, Schedule N of the tariff act of July 24, 1897.

7. In holding the merchandise dutiable at 45 per cent under paragraph 193 as manufactured metal.

8. In affirming the decision of the Board of General Appraisers.

9. In not reversing the decision of the Board of General Appraisers and of the collector of the port, and holding the merchandise dutiable either at 15 per cent under section 3 and the commercial agreement with France as proclaimed by the President or at 20 per cent under paragraph 454, Schedule N, of the tariff act.

BRIEF AND ARGUMENT.

I.

This court is without jurisdiction and the appeal should be dismissed.

To give this court jurisdiction on a direct appeal from, or writ of error to, a circuit court, there must be a real, substantial dispute or controversy concerning the construction or application of the Constitu-

tion or the constitutionality of a law of the United States, or the validity or construction of a treaty made under its authority, as provided in section 5 of the judiciary act of March 3, 1891 (26 Stat., 827). (*Western Union Telegraph Co.* v. *Ann Arbor R. R. Co.*, 178 U. S., 239, 243, 244; *Lampasas* v. *Bell*, 180 U. S., 276, 283; *American Sugar Refining Co.* v. *New Orleans*, 181 U. S., 277, 281.) No such dispute or controversy here exists.

A reciprocal commercial agreement negotiated under section 3 of the tariff act of 1897 is not a "treaty." Section 3 authorizes the President to enter into negotiations with the governments of foreign countries with a view to the arrangement of reciprocal commercial agreements in respect to certain kinds of merchandise specified therein, on which duties are reduced, but does not require, either expressly or by implication, action by either House of Congress. Any doubt that might otherwise exist upon this subject is removed by the provision in section 4 of the tariff act of 1897 for commercial *treaties* with foreign countries, which require ratification by the Senate.

A claim in words that such an agreement is a treaty was made in *Shaw* v. *United States* (212 U. S., 559), in which case this court, on motion of the Government, dismissed, for want of jurisdiction, a direct appeal from the Circuit Court for the Southern District of New York.

It is respectfully asked that the appeal be dismissed. If such action be not appropriate, it is asked that the judgment of the Circuit Court be affirmed.

LLOYD W. BOWERS,
Solicitor-General.

D. FRANK LLOYD,
Assistant Attorney-General.

MAY, 1910.

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B. ALTMAN & CO. *v.* UNITED STATES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 208. Argued April 25, 26, 1912.—Decided May 13, 1912.

This court will entertain a direct review of the judgment of the Circuit Court under § 5 of the Circuit Court of Appeals Act of 1891, in a revenue case which involves not only questions of classification and amount of duty thereunder, but also questions as to the constitutionality of a law of the United States or the validity or construction of a treaty under its authority.

Where the importer throughout has insisted that the merchandise is dutiable at the rate fixed by a reciprocal agreement entered into by the United States under § 3 of the Tariff Act of 1897, there is a direct appeal to this court under § 5 of the Circuit Court of Appeals Act of 1891, provided such agreement is a treaty.

Generally a treaty is a compact between two or more independent nations with a view to the public welfare, but *quære* whether under the provisions of the Constitution of the United States an agreement is a treaty unless made by the President and ratified by two-thirds of the Senate.

In construing the Circuit Court of Appeals Act of 1891, the intent of Congress will be considered, and it was manifestly to permit rights and obligations resting on international compacts and their construction to be passed on by this court.

A reciprocal agreement between the United States and a foreign nation entered into and proclaimed by the President under authority of § 3 of the Tariff Act of 1897 is a treaty within the meaning of § 5 of the Circuit Court of Appeals Act.

A term used in a reciprocal agreement made under § 3 of the Tariff Act of 1897 will be construed in the same way that such term is defined in the act itself; and so *held* that the word "statuary" used in the reciprocal agreement of May 30, 1898, with France of, 30 Stat. 1774, includes only such statuary as is cut, carved, or otherwise wrought by hand as the work of a sculptor.

172 Fed. Rep. 161, affirmed.

THE facts, which involve the construction of the tariff acts and of the reciprocal agreement with France of May 30, 1898, are stated in the opinion.

Mr. Henry J. Webster, with whom *Mr. John K. Maxwell* and *Mr. Howard T. Walden* were on the brief, for plaintiff in error:

The so-called agreement with France is a treaty.

The President and Senate undoubtedly have complete control of the making of treaties, so long as they refuse to join with the House of Representatives in making a treaty by act of Congress. There is a practical limitation to their power of carrying treaties into execution in cases where an act of Congress is necessary for that purpose, but that is a separate matter from their power to *make* treaties, which is unqualified. The House, therefore, has no right to demand any agency or share in the making of treaties, but has only a right to demand a share in the legislation, if any be necessary, to make them effective. If, however, the President and Senate voluntarily join with the House in the enactment of a law which authorizes the making of a treaty, and provides for its taking effect upon proclamation by the President, such action

includes the approval of the President, the advice and consent of the Senate, and the legislation required to put it into execution.

The power to pass a law authorizing the President to make a treaty reducing rates of duty in consideration of reciprocal reductions by a foreign nation, is an exercise of the power conferred by Art. I, § 8, to make all laws necessary and proper for carrying into execution the foregoing powers. *Legal Tender Cases*, 12 Wall. 457, 533, 538; quoting from *Fisher* v. *Blight*, 2 Cranch, 358.

The mere designation of the instrument by another name, even by Congress and the President, does not prevent its being a treaty, if it is such in substance. *Pollock* v. *Farmers' L. & T. Co.*, 157 U. S. 429, quoted with approval in *Fairbank* v. *United States*, 181 U. S. 283.

Treaties have quite frequently been denominated conventions, but that does not change their nature as treaties. *Bartram* v. *Robertson*, 122 U. S. 116, 118.

If a treaty remains a treaty when called a convention, it would seem equally to remain a treaty when called an agreement.

Congress has referred to the Hawaiian treaty in two instances as a convention, and in two others as a treaty. Act Aug. 15, 1875, 19 Stat. 200; Act Mar. 3, 1891, 26 Stat. 844; Act Aug. 27, 1894, par. 182½, 28 Stat. 521; Act July 24, 1897, par. 209, 30 Stat. 168.

In the general sense and without special reference to the Constitution and laws of the United States, the so-called commercial agreement with France is unquestionably a treaty.

There is no decided case involving directly the question whether a certain instrument was a treaty or not. As to what a treaty is, see *Foster* v. *Neilson*, 2 Pet. 253, 314; *Holmes* v. *Jennison*, 14 Pet. 540; *United States* v. *Rauscher*, 119 U. S. 407; *Whitney* v. *Robertson*, 124 U. S. 190.

This contract with France was between two independent nations; it was a formal contract, written in both French and English, signed by both parties and duly proclaimed by the President and also by the Secretary of the Treasury; it was upon consideration—a promise for a promise; it was for a considerable time and furnished a rule for almost daily action during its continuance; it was for the public welfare, and made in the name of the State, and was actually executed for a period of eleven years, its termination having been directed by § 4, act of August 5th, 1909, 36 Stat. 83.

In the Constitution and laws of the United States, the word "treaty" has no special meaning different from the general definition. *Hauenstein* v. *Lynham*, 100 U. S. 483, 489.

The reason for vesting the power to make treaties in the President and Senate appears to have been simply to secure secrecy and despatch, which, it was recognized, were often necessary, and except for this consideration, the power would doubtless have been expressly vested in Congress as a whole. 2 Madison, Journal of Const. Conv. of 1787, edited by Hunt, 327; Chas. Pinckney, 4 Elliott's Debates in State Conventions on Adoption of Federal Constitution, 253-267.

As to executive and legislative construction, see Annals of Congress, 4th Cong., 1st Sess., pp. 759, 771. See discussion in 1816; the question whether legislation was necessary to carry a certain treaty into effect, the House proposing to pass an act to carry a treaty into effect, to which the Senate disagreed; Annals of Congress, 14th Cong., 1st Sess., pp. 1022, 1057.

For legislative interpretation, see law enacted by Congress in 1872 for making postal arrangements, 17 Stat. 304, now § 398, Rev. Stat., in pursuance of which the treaty of Berne was entered into October 9, 1874, 19 Stat. 577, and was ratified by the Postmaster General by and

with the advice and consent of the President (*ib.* 588); *Cotzhausen* v. *Nazro*, 107 U. S. 215, 217. See also act tantamount to an offer to a foreign nation, which, when accepted by it, constituted a treaty in substance, although not incorporated into one document signed by both parties, and which granted certain rights to Canadian vessels in waters of the United States, to become effective when Canada extended the same privilege to American vessels in Canadian waters. Act of June 19, 1878, 20 Stat. 175, amended May 24, 1890, 26 Stat. 120, and again March 3, 1893, 27 Stat. 683. These were acts of Congress passed by both houses and approved by the President.

The Secretary of the Treasury in official documents has frequently referred to this contract with France, and others made in the same manner and by the same authority with other countries, as treaties (Treas. Dec. 19405, 21886, 22277, 22353, 23954). The Board of General Appraisers has done the same (T. D. 23166, 24971, 25442, 26208, 29070, 30490, 31202). This oft-repeated use of the word "treaty" as applied to these so-called commercial agreements indicates a general understanding in the executive departments that they are treaties.

In some court decisions this particular agreement with France has been called a treaty, without discussion as to the exact meaning of the word. *Nicholas* v. *United States*, 122 Fed. Rep. 892; *Migliavacca Wine Co.* v. *United States*, 148 Fed. Rep. 142; *Shaw* v. *United States*, 1 Cust. App. 426, also reported T. D. 31500.

Section 3 of the act of 1897, *supra*, was an expression of the advice and consent not only of the Senate, but also of the House of Representatives.

The Constitution, in conferring the power to make treaties, does not prescribe the time or method of the Senate giving its advice and consent. It can as well be given before negotiations as after, and certainly the con-

sent of the whole Congress is not inferior to the consent of the Senate alone. *Green* v. *Biddle*, 8 Wheat. 1, 85; *Poole* v. *Fleeger*, 11 Pet. 185, 209, affirming 1 McLean, 185; *Virginia* v. *West Virginia*, 11 Wall. 39, 59.

The supreme legislative authority in the United States is Congress. Const., Art. I, § 1. The power of the President and Senate to make treaties is necessarily subordinate in some respects.

A treaty can be repealed by an act of Congress. *Head Money Cases*, 112 U. S. 580, 599.

The more or less general use of the word "agreement" instead of "treaty" as applied to these reciprocal commercial contracts is easily accounted for.

It is within the spirit and intent of the act of March 3, 1891, *supra*, to give this court jurisdiction in this case. *Durousseau* v. *United States*, 6 Cranch, 307, 314.

If the agreement with France is a treaty, this court has jurisdiction of the entire case. *Horner* v. *United States*, 143 U. S. 570, 576.

The term "statuary" in the treaty with France includes all kinds or species of statuary, of any material and made by any process.

A name of an article used in a statute without qualification includes that article in all its forms and species. *Chew Hing Lung* v. *Wise*, 176 U. S. 156, 160; *Schoelkopf* v. *United States*, 71 Fed. Rep. 694.

There is absolutely nothing on the face of the treaty to indicate any limitation of the term "statuary" to a particular class of statuary.

Where a treaty admits of two constructions, one restrictive as to the rights that may be claimed under it, and the other liberal, the latter is to be preferred. *Shanks* v. *Dupont*, 3 Pet. 242. Such is the settled rule in this court. *Hauenstein* v. *Lynham*, 100 U. S. 483, 487; *Chow Heong* v. *United States*, 112 U. S. 536, 539; *New York Indians* v. *United States*, 170 U. S. 1, 23.

The published presidential proclamation of the treaty with France, 30 Stat. 1774; T. D. 19405, contains no intimation that the statuary therein referred to was to be only professional productions of sculptors.

Although the particular amendment adopted by the Senate, and not included in the treaty and proclamation, did not have the approval of the President, it was not, therefore, ineffective as an amendment. A strict and technical view would have been that the treaty as finally ratified and proclaimed by the President did not have the full and complete consent of the Senate, and, therefore, was no treaty. But the court apparently did not regard this view with sufficient seriousness to even mention it.

Obviously the treaty must contain the whole contract between the parties. *New York Indians Case, supra; Fourteen Diamond Rings*, 183 U. S. 176; *Meigs* v. *McClung's Lessee*, 9 Cranch, 11.

The intention should not be imputed to Congress to limit the statuary covered by § 3 by a clause "kept in the background," in the midst of a long and involved statute. The provision on which the Government relies is obscurely placed as a proviso to par. 454 of the Tariff Act of 1897 (30 Stat. 194).

The office of a proviso, generally, is either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it, as extending to cases not intended by the legislature to be brought within its purview. *Minis* v. *United States*, 15 Pet. 423, 445; *United States* v. *Dickson*, 15 Pet. 141, 165; *White* v. *United States*, 191 U. S. 545, 551.

Section 3 is a thing apart. It did not, *ex proprio vigore*, fix any rate of duty, or provide for the free admission of any articles. It could not operate contemporaneously with §§ 1 and 2, as to the same importation. The moment it is effective, §§ 1 and 2 are suspended *pro tanto*. *Barber*

v. *Schell*, 107 U. S. 617, 620; *Nicholas* v. *United States*, 122 Fed. Rep. 892; *United States* v. *Luyties*, 124 Fed. Rep. 977; *United States* v. *Wile*, 124 Fed. Rep. 1023; *S. C.*, 130 Fed. Rep. 331.

The cases of *Richard & Co.* v. *United States*, 158 Fed. Rep. 1019, and *Shaw* v. *United States*, 158 Fed. Rep. 648, 212 U. S. 559, can be distinguished.

Mr. Assistant Attorney General Wemple, with whom *Mr. Charles E. McNabb*, Assistant Attorney, and *Mr. Frank L. Lawrence*, Special Attorney, were on the brief, for the United States:

This court has no jurisdiction of the appeal in any view of the case.

A reciprocal commercial agreement under § 3 of the Tariff Act of 1897 is not a treaty within the meaning of the Constitution of the United States and § 5 of the Judiciary Act of March 3, 1891, c. 517, 26 Stat. 826, 828.

As such agreements cannot legally extend the scope of the law, the agreement with France cannot be construed to embrace statuary not covered by said § 3.

The merchandise in suit, not being wrought by hand from metal and the professional production of a statuary or sculptor only, is excluded from the operation of § 3 by the express limitation in paragraph 454 of the same act.

No question is presented of which this court has jurisdiction upon direct appeal from the Circuit Court.

The sovereign is not suable in its own courts without its expressed consent. This is a suit against the United States, and general acts do not apply to the sovereign unless the sovereign be mentioned therein. *Cheatham* v. *United States*, 92 U. S. 85.

Jurisdiction is unwarranted by the record, and unsupported by the law. The commercial agreement is not a treaty. In a broad sense perhaps all treaties are

agreements or contracts, the word "agreement" being sufficiently comprehensive to embrace all forms of stipulation, written or verbal, and relating to all kinds of subjects, *Virginia* v. *Tennessee*, 148 U. S. 503, 517, but all agreements or contracts are not treaties. "Treaty" is a word of superior dignity; "agreement" is not to be taken as generic, but as comprehending only what is inferior.

This particular agreement is not a treaty within the meaning of the Constitution and of the Judiciary Act of 1891. *Holmes* v. *Jennison*, 14 Pet. 540, 570.

There is a distinction between a treaty and an act of Congress.

In this country a treaty is something more than a contract, for the Federal Constitution declares it to be the law of the land. *Haver* v. *Yaker*, 9 Wall. 32, 35; *Head Money Cases*, 112 U. S. 580, 598; *United States* v. *Rauscher*, 119 U. S. 407.

The commercial agreement was not a law; the law was § 3 of the Tariff Act of 1897. The agreement could legally add nothing to that. *United States* v. *Wile*, 130 Fed. Rep. 331; *Richard* v. *United States*, 151 Fed. Rep. 954; *S. C.*, 158 Fed. Rep. 1019.

Upon its proclamation one rate of duty was substituted for another, the latter being "suspended" by the law during the continuance of the agreement.

Authority to ascertain and declare the event or state of things upon which a law shall take effect may be constitutionally delegated to the President, but he is restricted to that. No legislative power can be delegated. *Field* v. *Clark*, 143 U. S. 649, 682; *Brig Aurora*, 7 Cranch, 382, 388.

It is different with treaties. They are made by the President by and with the advice and consent of the Senate. Concurrence of two-thirds of the Senators present is essential.

It is incompatible with the Constitution to regard an agreement under § 3 of the Tariff Act of 1897 as a treaty upon the theory that the legislative assent was signified in advance rather than after negotiation, when such assent is implied from a majority vote, as in the case of the Tariff Act of 1897. The vote in the Senate stood: Yeas 38, nays 28, not voting 23 (Cong. Rec., 55th Cong., 1st sess., vol. 30, pt. 3, p. 2447). That is less than "two-thirds of the Senators present," and a treaty to be one in the constitutional sense can only thus be made by the President and the Senate. *Head Money Cases*, 112 U. S. 580, 599; *New York Indians* v. *United States*, 170 U. S. 1, 23; *De Lima* v. *Bidwell*, 182 U. S. 1, 194, 195.

A resolution adopted by the Senate by less than two-thirds of a quorum was held without legal significance in respect to the intention of the Senate in the ratification of the treaty of peace with Spain. *Fourteen Diamond Rings* v. *United States*, 183 U. S. 176, 183. *Cotzhausen* v. *Nazro*, 107 U. S. 215, cited by appellants, did not decide that a postal agreement is a treaty within the meaning of the Constitution, and may be made without the concurrence of two-thirds of the Senators present. Whether or not it was a treaty in the constitutional sense was not in issue and not decided.

Improper use of terms is not uncommon in legislation. See § 1955 of the Revised Statutes, where "exportation" to Alaska from any port in the United States is spoken of. There can be no doubt that the word "exportation" was there irregularly used, and should not be deemed a legislative interpretation or use extending it to shipments which are not exportations within the meaning of the Constitution.

The commercial agreement with France was negotiated as an agreement and not as a treaty. The word "treaty" nowhere appears, but the word "agreement" is frequently used. The certificate of the Secretary of State, further-

more, refers to it as a "reciprocal commercial agreement."

There is implied legislative declaration in the very act under discussion that agreements of the sort mentioned in § 3 are not treaties. See § 4 of the same act, 30 Stat. 204, 205.

Both "agreement" and "concession," as far as the President is concerned, had reference only to merchandise imported into the foreign county from the United States. The law designated the articles that might be imported into the United States from the foreign country and specified the duty to be collected in lieu of the ordinary rates, expressly suspended. The President could not add to the articles nor change the rates of duty. Congress left neither to his discretion.

The word "statuary" means the same in § 3 as in paragraph 454 of the Tariff Act of 1897. *Nicholas* v. *United States*, 122 Fed. Rep. 892; *Richard* v. *United States*, 151 Fed. Rep. 954.

The same words occurring in different parts of a statute are to be taken in the same sense. *Swan & Finch Co.* v. *United States*, 190 U. S. 143, 145, 146; 17 Opin. Atty. Gen. 579; 21 *id.* 501; 23 *id.* 418; *Reiche* v. *Smythe*, 13 Wall. 162, 165.

MR. JUSTICE DAY delivered the opinion of the court.

This is an appeal from an order of the Circuit Court of the United States for the Southern District of New York, affirming a decision of the Board of General Appraisers, which sustained an assessment of duty by the collector at the port of New York upon a certain bronze bust imported by the appellants, B. Altman & Co.

The bust was imported from France and was assessed a duty of 45 per cent. ad valorem under paragraph 193 of the Tariff Act of 1897 (30 Stat. 151, 167), which covers articles or wares not specially provided for in the act,

composed wholly or in part of metal, and whether partly or wholly manufactured. A protest was filed by the importers, in which they contended that the bust should be classed as statuary under the commercial reciprocal agreement with France (30 Stat. 1774), which was negotiated under the authority contained in § 3 of the Tariff Act of 1897 to make reciprocal agreements with reference, among other articles, to "paintings in oil or water colors, pastels, pen and ink drawings, and statuary." A considerable amount of testimony was taken before the Board of General Appraisers, and it held that the bust was cast in a foundry by mechanics from a model furnished by the artist, and that the artist did little or no work upon the casting, and overruled the protest, on the authority of *Richard* v. *United States*, 158 Fed. Rep. 1019, and *Tiffany* v. *United States*, 71 Fed. Rep. 691.

The Circuit Court affirmed the order and decision of the Board of General Appraisers on the authority of the same cases, and an appeal was prayed to this court, which was allowed, the Circuit Judge certifying that the questions involved in the case were, in his opinion, of such importance as to require a review of the decision of the court by the Supreme Court of the United States.

Certain errors were assigned, and the following are insisted upon in this court:

"1. In not holding that the commercial agreement between the United States and France, as proclaimed by the President of the United States (T. D. 19405 and 30 Stat. 1774), was to be in full scope according to its language without being in any way restricted or modified by the definition contained in paragraph 454, section 1, of the Tariff Act of July 24, 1897, but which definition was not embodied either in the commercial agreement itself or in the President's proclamation thereof.

"2. In not holding that the term 'statuary' as used in section 3 of the Tariff Act and in said commercial agree-

ment with France or the President's proclamation thereof, was not subject to the definition contained in paragraph 454, Schedule N, Section 1, of said Tariff Act.

"3. In not holding the merchandise dutiable at 15 per cent. ad volorem under section 3 of the Tariff Act and the commercial agreement with France and the President's proclamation thereof.

"7. In holding the merchandise dutiable at 45 per cent. under paragraph 193 as manufactured metal.

"8. In affirming the decision of the Board of General Appraisers.

"9. In not reversing the decision of the Board of General Appraisers and of the Collector of the Port and holding the merchandise dutiable at either 15 per cent. under section 3 and the Commercial Agreement with France, as proclaimed by the President."

A motion was made by the Solicitor General to dismiss the appeal. That motion was postponed for hearing with the case upon its merits. To support the motion it is contended on behalf of the United States that no question is involved which, under § 5 of the Circuit Court of Appeals Act of March 3, 1891, 26 Stat. 826, 827, 828, c. 517, entitles the appellant to a direct appeal from the Circuit Court to this court. By the Circuit Court of Appeals Act that court is given jurisdiction to review appeals in revenue cases and by the sixth section of the act judgments of that court in such cases are made final.

Prior to June 10, 1890, the right to a review of revenue cases was by appeal to this court from the Circuit Court. (R. S., § 699.) By the act of June 10, 1890, 26 Stat. 131, c. 407, special provision was made for the review of revenue cases where the owner, importer, etc., was dissatisfied with the decision of the Board of General Appraisers. Under § 15 of that act an appeal was given from the decision of the Board of General Appraisers "as to the construction of the law and the facts respecting the classi-

fication of such merchandise and the rate of duty imposed thereon under such classification . . . to the circuit court of the United States within the district in which the matter arises, for a review of the questions of law and fact involved in such decision." And it was provided that the decision of the Circuit Court should be final, unless the court should be of the opinion that the question involved was of such importance as to require a review of such decision by the Supreme Court of the United States, in which case an appeal was allowed to this court. It is to be observed that the cases herein referred to are strictly revenue cases, in which the decision concerns the classification of merchandise and the rate of duty imposed thereon under the classification made. This act remained in force until amended by the act of May 27, 1908, 35 Stat. 403, c. 205, to which we shall have occasion to refer later. In the meantime, on March 3, 1891, the Circuit Court of Appeals Act was passed, giving a direct appeal in certain cases to this court. So much of § 5 as is pertinent to this case provides:

"That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases:

* * * * * * * *

In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question."

The Circuit Court of Appeals Act did not repeal the revenue act to which we have referred, but broadly provided for direct appeal to this court from the Circuit Court in any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty, etc., was drawn in question.

We think the cases show that this court, so far as it has had occasion to deal with the question, has permitted direct appeal to this court in all revenue cases where, in

addition to the objection to classification of merchandise and rate of duty imposed, a real question under § 5 has been involved.

In *Anglo-Californian Bank* v. *United States*, 175 U. S. 37, an attempt was made to take an appeal to this court from a judgment of the Circuit Court of Appeals, affirming the decree of the Circuit Court, which overruled the decision of the Board of General Appraisers, and it was held that the appeal would not lie. In the course of the opinion Mr. Chief Justice Fuller said that under the act of June 10, 1890, a direct appeal would lie to this court if the Circuit Court certified that the question involved was of such importance as to require a review of such decision and decree by this court, but the Chief Justice pointed out that the attempted appeal was not an appeal from the Circuit Court directly to this court, nor did the case fall within any of the classes of cases enumerated in § 5, in which a direct appeal to this court would lie, and, moreover, that the Judiciary Act of March 3, 1891, prescribed a different rule as to the prosecution of appeals. While the question here made was not directly involved in that case, it is to be fairly inferred that the court would have sustained an appeal had the case been brought from the Circuit Court within the terms of § 5 and upon one of the grounds there stated.

In the case of *Spreckels Sugar Ref. Co.* v. *McClain*, 192 U. S. 397, an appeal was allowed from the Circuit Court of Appeals to this court, and, concerning what were revenue cases within the meaning of the Circuit Court of Appeals Act, under the sixth section, making that court's judgment final in cases arising under the revenue laws, this court said (p. 408):

"So far as we now remember, this precise point has not heretofore arisen for our determination. Looking at the purpose and scope of the act of 1891, we are of opinion that the position of the Government on this point cannot be

sustained. It rests upon an interpretation of the act that is too technical and narrow. The meaning of the words 'arising . . . under the revenue laws,' in the sixth section, is satisfied if they are held as embracing a case strictly arising under laws providing for internal revenues and which does not, by reason of any question in it, belong also to the class mentioned in the fifth section of that act."

While the *Spreckels Case* was commented on and limited in some measure in the subsequent case of *Macfadden* v. *United States*, 213 U. S. 288, nothing was said to indicate any disagreement with the definition of this court as to what was a case arising under the revenue laws, and the court said that the *Spreckels Case* was held not to be final in the Circuit Court of Appeals because the original jurisdiction involved the construction of the Constitution of the United States, as well as a strictly revenue question, and that, thus construed, it was consistent with all the decisions.

From the principles laid down in these cases, we think it is plain that this court will entertain a direct review in a revenue case which involves not only questions of classification and amount of duty thereunder, as specified in the revenue act to which we have referred, but also a question under the fifth section as to the constitutionality of a law of the United States or the validity or construction of a treaty under its authority.

Nor did the amendment of the revenue act by the act of May 27, 1908, affect any change in this respect, for its provisions, with respect to the review of the decision of a Circuit Court, are substantially identical with the act of June 10, 1890, except that the decision of a Circuit Court is made final, unless the court certifies that it is of the opinion that the question involved is of such importance as to require a review of such decision by the Circuit Court of Appeals, the decree of which may be reviewed in the

Supreme Court in any of the ways provided in cases arising under the revenue laws by the act approved March 3, 1891, being the Circuit Court of Appeals Act; but that act (Amendment of May 27, 1908), like the act of June 10, 1890, provides only for the review of decisions of the Board of General Appraisers "as to the construction of the law and the facts respecting the classification of such merchandise and the rate of duty imposed thereon under such classification." We do not think that this act changes the effect of the Circuit Court of Appeals Act and operates to prevent an appeal here in cases really involving the Constitution of the United States or the construction of a treaty.

The Government relies, in support of its motion to dismiss, on *Shaw* v. *United States*, 212 U. S. 559. In that case, however, the appeal was undertaken to be made directly from the Circuit Court because of an alleged deprivation of constitutional right, and because of the construction of a reciprocal agreement made with Italy under the Tariff Act of 1897. The case was dismissed on the authority of *American Sugar Ref. Co.* v. *United States*, 211 U. S. 155, in which it was held that the only real substantial controversy concerned the construction of the Tariff Act of 1897. An examination of the record in the *Shaw Case* shows that no real constitutional question was involved and that the assessment of duty was in accordance with the reciprocal commercial agreement with Italy. See *Shaw* v. *United States*, 158 Fed. Rep. 648.

The report of the *American Sugar Refining Company Case*, to which the court referred in the *Shaw Case* and which was decided at the same term (211 U. S. 155), shows that it was an attempt to appeal directly from the Circuit Court, and that this court did not think that the constitutional question made in the case had any real merit, but that the only question was a construction of the Tariff Act relating to the collection of duty upon sugar, and

therefore this court had no jurisdiction by direct appeal. In this connection this court said (p. 161):

"The present direct appeal to this court is a mere attempt to obtain a reconsideration of questions arising under the revenue laws and already determined by the Circuit Court of Appeals [upon a former appeal] in due course. Such direct appeals [from a circuit court], under § 5 of the act of 1891, cannot be entertained unless the construction or application of the Constitution of the United States is involved."

An examination of the record in the present case shows that the importer throughout insisted that the statuary was dutiable at 15 per cent. ad valorem under the reciprocal agreement between the United States and France entered into under the authority of § 3 of the Tariff Act of 1897. If this contention be correct, then the assessment was wrong, and, if the reciprocal agreement referred to was a treaty within the meaning of § 5 of the Circuit Court of Appeals Act, then there was a right of direct appeal to this court.

Generally, a treaty is defined as "a compact made between two or more independent nations with a view to the public welfare." 2 Bouvier's Dictionary, 1136. True, that under the Constitution of the United States the treaty making power is vested in the President, by and with the advice and consent of the Senate, and a treaty must be ratified by a two-thirds vote of that body (Art. II, § 2), and treaties are declared to be the supreme law of the land (Art. VI); but we are to ascertain, if possible, the intention of Congress in giving direct appeal to this court in cases involving the construction of treaties. As is well known, that act was intended to cut down and limit the jurisdiction of this court, and many cases were made final in the Circuit Court of Appeals which theretofore came to this court, but it was thought best to preserve the right to a review by direct appeal or writ of error from a Circuit Court in certain matters of importance, and, among others,

those involving the construction of treaties. We think that the purpose of Congress was manifestly to permit rights and obligations of that character to be passed upon in the Federal court of final resort, and that matters of such vital importance, arising out of opposing constructions of international compacts, sometimes involving the peace of nations, should be subject to direct and prompt review by the highest court of the Nation. While it may be true that this commercial agreement, made under authority of the Tariff Act of 1897, § 3, was not a treaty possessing the dignity of one requiring ratification by the Senate of the United States, it was an international compact, negotiated between the representatives of two sovereign nations and made in the name and on behalf of the contracting countries, and dealing with important commercial relations between the two countries, and was proclaimed by the President. If not technically a treaty requiring ratification, nevertheless it was a compact authorized by the Congress of the United States, negotiated and proclaimed under the authority of its President. We think such a compact is a treaty under the Circuit Court of Appeals Act, and, where its construction is directly involved, as it is here, there is a right of review by direct appeal to this court.

Coming to the merits, the contention of the importer is that the word "statuary" should receive its popular construction, and that the term should include such a piece of cast bronze as is here involved, but we think the definition and authority of the act cannot be ignored in this connection.

The negotiation was entered into between the representatives of the two countries under the authority of § 3 of the Tariff Act of 1897, as we have seen. In that act the term "statuary" is defined as follows: "The term 'statuary' as used in this act shall be understood to include only such statuary as is cut, carved, or otherwise wrought

by hand from a solid block or mass of marble, stone, or alabaster, or from metal, and as is the professional production of a statuary or sculptor only." The reciprocal agreements were authorized with reference to "paintings in oil or water colors, pastels, pen and ink drawings, and statuary." We think this must have reference to statuary as already defined in the act, which both parties understood was the source of their authority to negotiate the reciprocal commercial agreement in question, for the agreement provides:

"It is reciprocally agreed on the part of the United States, in accordance with the provisions of section 3 of the United States Tariff Act of 1897, that during the continuance in force of this agreement the following articles of commerce, the product of the soil or industry of France, shall be admitted into the United States at rates of duty not exceeding the following, to wit:

* * * * * * * *

"Paintings in oil or water colors, pastels, pen-and-ink drawings, and statuary, fifteen per centum ad valorem."

Thus in its terms the agreement was made under the authority and in accordance with § 3 of the Tariff Act of 1897, in which very act the term statuary, as used therein, was specifically defined, as we have already stated.

We think that it is clear that the Board of General Appraisers and the Circuit Court did not err in finding that this bronze statue was not wrought by hand from metal. On the other hand, the testimony is clear that the statue was cast from metal by artisans employed for that purpose, and was very little touched, if at all, in its finishing, by the professional designer.

The result is that the judgment must be

Affirmed.